84-1053

NO.

Office-Supreme Court, U.S.
FILED
JAN 2 1985
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1984, TERM

THE ECCLESIASTICAL ORDER
OF THE ISM OF AM, INC., PETITIONER

V.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOSEPH FALCONE

4000 Town Center
Suite 500
Southfield, MI 48075
(313) 357-0666

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Whether it is a violation of the Establishment and Free Exercise Clause of the First Amendment and a denial of equal protection to require religions not organized as "churches" to register under 26 U.S.C. 508 and subject themselves to administrative review to attain tax exempt status, when religions that are organized as "churches" do not have to so register.

2. Whether it is a violation of the Establishment and Free Exercise Clause of the First Amendment and a denial of equal protection/due process for the Internal Revenue Service and the Tax Court to deny tax exempt status to one religious organization while allowing tax exempt status to similarly situated religious organizations engaged in similar activities.

3. Whether the Tax Court in reviewing a ruling by the Internal Revenue Service on the tax exempt status of a religious organization by means of a declaratory judgment action under 26 U.S.C 7428 must review the same administrative record which was used by the Internal Revenue Service when it made its administrative ruling.

4. Whether the denial of tax exempt status to a religious organization can be based upon the content of speech between the members of the religious organization.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT 3

REASONS FOR GRANTING THE PETITION . . 15

1. "CHURCH" TYPE RELIGIONS ARE IMPERMISSIBLY FAVORED OVER OTHER RELIGIONS. 18

2. THE INTERNAL REVENUE SERVICE HAS PREFERRED SIMILARLY SITUATED RELIGIONS OVER PETITIONER. 30

3. THE TAX COURT DID NOT REVIEW THE SAME ADMINISTRATIVE RECORD AS USED BY THE INTERNAL REVENUE SERVICE TO MAKE ITS ADMINISTRATIVE DECISION. 40

4. PETITIONER WAS DENIED ITS TAX EXEMPTION BECAUSE OF THE CONTENT OF ITS SPEECH. 50

CONCLUSION 58

-APPENDIXES A, B, C, AND D-
SEPARATELY BOUND

TABLE OF AUTHORITIES

Cases	Page
Abington School District v. Schempp, 374 U.S. 203, (1963)	18
Alive Fellowship of Harmonious Living, T.C. Memo 1984-87 (1984)	57
Baggett v. Bullitt, 377 U.S. 360 (1964)	55
Basic Bible Church of America v. Commissioner, T.C. Memo 1983-287 (1983)	57
Big Mama Rag, Inc. v. United States, 631 F. 2d 1030 (D.C. Cir. 1980)	55
Brown v. Commissioner, T.C. Memo 1980-553 (1980)	13
B.S.W. Group, Inc. v. Commissioner, 70 T.C. 352 (1978)	35
Church of Transfiguring Spirit, Inc., v. Commissioner, 76 T.C. 1 (1981)	57
Ecclesiastical Order of the Ism of Am, Inc. v. Internal Revenue Service, 725 F.2d 398, (6th Cir. 1984)	14
Engel v. Vitale, 370 U.S. 421 (1962)	19

Cases (cont.) **Page**

Everson v. Board of Education, 330 U.S. 1, (1947). 18

Golden Rule Church Association v. Commissioner, 41 T.C. 719 (1964). . .35-36

Hall v. Commissioner, T.C. Memo. 1982-337 (1982). 12

Holy Spirit Association for Unification of World Christianity v. Tax Commissioner of City of New York, 435N.E. 2d 662, (1982) 29

Ideal Life Church of Lake Elmo v. County of Washington, 304 N.W. 2d 308, (S.Ct. Minn. 1981). . . . 29

Kellman v. Commissioner, T.C. Memo. 1981-615 (1981). 12

Larson v. Valente, 456 U.S. 228 (1982). 18, 23, 24

Lemon v. Kurtzman, 403 U.S. 602 (1971). 24, 28

Murphy v. Commissioner, T.C. Memo 1983-59 (1983). 12

National Association of American Churches v. Commissioner, 82 T.C. 18 (1984) 57

New Life Tabernacle v. Commissioner, T.C. Memo 1982-367 (1982) 57

Cases (Cont.) Page

O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979). 52

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, (1937). 44

Parshall Christian Order v. Commissioner, T.C. Memo 1983-11 (1983). 57

People of God Community v. Commissioner, 75 T.C. 127 (1980). . .44-45

Schilberg v. Commissioner, T.C. Memo. 1982-336 (1982) 12

Schoger Foundation v. Commissioner, 76 T.C. 380 (1981) . . . 57

Truth Tabernacle v. Commissioner, T.C. Memo 1981-214 (1981) 57

Torcaso v. Watkins, 367 U.S. 488 (1961) 39

Universal Life Church, Inc. (Full Circle) v. Commissioner, 83 T.C. 292 (1984). 12, 21, 48, 57

Universal Life Church, Inc., v. United States, 372 F. Supp 770 (E.D. Cal. 1974). 33, 39

United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972). . . . 47

Cases (Cont.) Page

United States v. Florida East Coast R. Co., 410 U.S. 224. 47

U.S. Lines v. Federal Maritime Commission, 584 F.2d 519 (D.C. Cir. 1978). 48

Widmar v. Vincent, 454 U.S. 263 (1981) 29, 51

Zorach v. Clauson, 343 U.S. 306 (1952). 18

Statutes

5 USC 554 45

5 USC 556 . . . . . 45, 47

5 USC 557 47

26 USC 170(b)(1)(A)(i). 21, 22

26 USC 410 (c) and (d). 21, 22

26 USC 411(e)(1)(B) 21

26 USC 411(h)(4). 21

26 USC 414(e) 21, 22

26 USC 501(c)(3). 7,12, 20, 30, 35, 39, 57

26 USC 501(h) 21

Statutes (Cont.) Page

26 USC 508. . . . . 7, 8, 20, 24

26 USC 508(c)(1)(A) 22

26 USC 509. 21

26 USC 509(a)(1). 23

26 USC 511-14 21

26 USC 512(b)(12), (14) and (15). . . . 22

26 USC 514(b)(3)(E) 22

26 USC 1402(a)(8) and (c)(4). 22

26 USC 3121(b)(8)(A), (i)(4), (r)(1) and (2). 22

26 USC 3309 21

26 USC 3309(b)(1) 23

26 USC 3309(b)(2) 22

26 USC 3401(a)(9) 22

26 USC 6033 21

26 USC 6033(a)(2)(A)(i) 23

26 USC 6033(a)(2)(A)(iii) 22

26 USC 6043(b)(1) 21, 23

26 USC 7605(c). 23

26 USC 7428 . . . . . 40-44, 46-48

Miscellaneous Page

Age of Reason,
Thomas Paine 4, 6, 7

Deism in Enghteenth Century
America, Herbert M. Morais 4

Republican Religion
G. Adolph Koch 5

Encyclopedia Britannica 4, 5

IRS Publication 78 8

"Church" in the Internal
Revenue Code: The Definitional
Problems, Whelan, 45 Fordham
L. Rev. 885 (1977). 20

The New American Bible 54

Private Letter Rulings
7838028 - 7738036 38

Revenue Ruling 73-285,
1973-2 C.B. 174 38

Revenue Ruling 56-403,
1956-2 C.B. 307 38

Tax Court Rule 217(b)(1). 45

Legislative History

Senate Report No. 938,
94th Cong. 2d. Sess (1976). 44

House Report No. 658,
94th Cong. 1st Sess. (1975) 44

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1984, TERM

THE ECCLESIASTICAL ORDER
OF THE ISM OF AM, INC., PETITIONER

V.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner, The Ecclesiastical Order of the ISM of AM, Inc., respectfully prays that a Writ of Certiorari issue to review the Judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on July 31, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A-1) is not reported. The opinion of the Tax Court (App.B-9) is reported at

80 T.C. 833. The Memorandum Sur Order of the United States Tax Court denying Petitioner's Motion to Supplement the Administrative Record (B-3) was not reported. The Order and Opinion of the United States Tax Court Denying Petitioner's Motion to Vacate or Revise the Decision (B-39), and The Order and Opinion of the United States Tax Court Denying Peitioner's Motion for Reconsideration (B-37) were not reported.

JURISDICTION

The judgment of the Court of Appeals (App. A-1) was entered on July 31, 1984. A Petition for Rehearing was denied on October 15, 1984 (App. A-5). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the First Amendment to the Constitution and the Fifth Amendment to the Constitution which are set forth in Appendix D at page D-20.

Various sections of the Internal Revenue Code are involved: 26 U.S.C. 170(b) (App. D-1); 26 U.S.C. 508 (App. D-4) and 26 U.S.C. 7428 (App. D-7).

Also, sections of the Administrative Procedure Act are involved: 5 U.S.C. 554 (App. D-9); 5 U.S.C. 556 (D-14) and 5 U.S.C. 706 (D-15).

This case also involves Tax Court Rule 210(b)(11), (App. D-17), and Tax Court Rule 217(b), (App. D-18).

STATEMENT

This case involves issues relating to

the establishment of religion by the Internal Revenue Code which discriminates on its face in favor of religions that are organized into churches. The case also involves conduct by the Internal Revenue Service which is violative of the Free Exercise and Establishment Clauses of the First Amendment in its selective automatic granting of tax exempt status only to religious organizations which meet Internal Revenue Service criteria regarding religious beliefs, organization, speech, and membership.

Petitioner is a Deistic religion that follows the teachings of Thomas Paine set forth in the Age of Reason.[1/] As defined by the Encyclopedia Britannica, 15th

---

1/ Age of Reason was first published in America by a religious house as a religious book, and was sold in Virginia along with the Bible by Parson Weems, George Washington's friend and biographer. Deism in Eighteenth Century America, Herbert M. Morais, P.H.d (1934), pages 163-64.]

Edition, Volume 5, page 561:

> Deism, as the word is customarily employed, describes an unorthodox religious attitude that found expression among a group of English writers beginning with Edward Herbert ... in the first half of the 17th Century and ending ... in the middle of the 18th Century. In general, however, it refers to what can be called natural religion, the acceptance of a certain body of religious knowledge that is inborn in every person or that can be acquired by the use of reason, as opposed to knowledge acquired through either revelation or the teaching of any church. ... By the end of the 18th Century, Deism had become a dominant religious attitude among intellectual and upper class Americans. Benjamin Franklin, the great sage of the colonies and then of the new republic, summarized in a letter to Ezra Stiles, president of Yale College, a personal creed that almost literally reproduced Herbert's five fundamental beliefs. The first three Presidents of the United States also held Deistic convictions, as amply evidenced in their correspondence.

The book Republication Religion by G. Adolph Koch, Ph.d. (1933), makes it clear that Ethan Allen, Thomas Paine, Benjamin Franklin and Thomas Jefferson could be legitimately considered Deists. It is Petitioners' main goal and purpose to

reestablish Deism in America. Because Deism does not comport with the religious beliefs of more "traditional" religions, and because it does not meet the Internal Revenue Service criteria for what a religion ought to be, the Internal Revenue Service has sought to suppress it.

Further, Petitioner fears that the Internal Revenue Service is attempting to actively suppress its Deistic beliefs for political reasons. As Thomas Paine stated in The Age of Reason:

> But pure and simple Deism does not answer the purpose of despotic governments. They cannot lay hold of religion as an engine, but by mixing it with human inventions, and making their own authority a part; neither does it answer the avarice of priests, but by incorporating themselves and their functions with it, and becoming, like the government, a party in the system. It is this that forms the otherwise mysterious connection of Church and State; the Church humane, and the State tyrannic.
>
> It has been the scheme of the Christian Church, and of all the other invented systems of religion,

> to hold man in ignorance of the Creator, as it is of Governments to hold man in ignorance of his rights. The systems of the one are as false as those of the other, and are calculated for mutual support.

The Age of Reason, Thomas Paine, Citadel Press, (1974), pages 186-87.

As a Deistic religion, Petitioner was not initially organized into a "church" or a structured organization. Thus, it could not be considered automatically tax exempt under 26 U.S.C. 508 and 501(c)(3). Because Petitioner's founder, George N. Baustert, believed that all religions were entitled to tax exempt status under the laws of the United States of America, and knowing of no other way to achieve tax exempt status, he studied other religious organizations, and found that the Universal Life Church of Modesto, California, was exempt from taxation under 26 U.S.C. 501(c)(3), and was recogized as so each year by the Internal Revenue Service by its annual list of tax exempt

organizations, Publication 78.

George N. Baustert, acting in reliance on the fact that the Internal Revenue Service in Publication 78 was permitting the Universal Life Church to operate as a tax exempt organization, purposely copied the organizational structure of the Universal Life Church.

Because the Petitioner may not be considered automatically exempt under 26 U.S.C. 508, Petitioner had to apply to the Internal Revenue Service for exempt status relying on Petitioner's organizational and operational similarity to the Universal Life Church as the reason why it should be granted the exemption.

The Internal Revenue Service, however, denied Petitioner tax exempt status precisely <u>because</u>, Petitioner was similar to the Universal Life Church. The Internal Revenue Service, in its Brief to the Tax Court, presented these proposed

findings of fact:

> 171. The modus operandi of the Ism of AM is based on that used by the Universal Life Church of Modesto, California, with some refinements
>
> 174. Purported distinctions from the modus operandi used by the Universal Life Church of Modesto, California, is that an Ism of Am minister must "truly" believe the doctrine, the creed, the theory and the practice of the Ism of Am which is "guaranteed" by the signing of the I AM U + U Am I vow card.

The Tax Court, though it specifically stated: "After studying materials developed by the Universal, Life Church, Rev. Baustert wrote new literature and instituted several refinements in petitioner's method of operations," totally ignored the fact that the Universal Life Church was tax exempt, and went on to hold that: "Petitioner has not suggested that there exists, and, we submit, cannot find, a single instance in which respondent has granted tax-exempt status to a religious organization that

carried on activities similar to petitioners."

Thus, even though the Petitioner purposely attempted to conform to the method of operation of the Universal Life Church in reliance upon the Internal Revenue Service's support and approval of the Universal Life Church's method of operation, both the Internal Revenue Service and the Tax Court disallowed Petitioner's tax exempt status, based on that very similarity. Petitioner's "misguided" attempt to conform, of course, resulted in the infringment upon the free exercise clause that occurs when the government approves or establishes one religion above others.

Petitioner continued to reiterate on the record in both the Tax Court and the Sixth Circuit Court of appeals that the Universal Life Church, which Petitioner had patterned itself after, and to which

Petitioner had been compared as justification for the denial of Petitioner's tax exempt status, was an IRS recognized tax exempt organization. It was only after Petitioner had filed a Motion for Reconsideration in the Sixth Circuit, however, once again specifically pointing out the inconsistancy of the Internal Revenue Service and the Tax Court basing their denial to Petitioner of its tax exemption on the fact that Petitioner was similar to and was patterned after the Universal Life Church, while the Universal Life Church continued to operate as tax exempt, did the Internal Revenue Service, on August 28, 1984, give the Universal Life Church notice that its tax exemption was being contested. This most mild and preliminary administrative action occured more than three and one half years after petitioner was denied tax exempt status.

This inconsistant treatment has never

been explained by the Internal Revenue Service, nor has the Internal Revenue Service offered any explanation of the years of favored treatment of the Universal Life Church.

Petitioner contends that one of the reasons that the Internal Revenue Service may have wanted the Universal Life Church to to continue its operation as a tax exempt organization (it is still considered a 501(c)(3) organization today), is to put itself in a position to selectively prosecute persons that are attracted to the Universal Life Church membership. See, for example, Universal Life Church, Inc. (Full Circle) v. Commissioner, 83 T.C. 292 (1984); Murphy v. Commissioner, T.C. Memo 1983-59 (1983); Schilberg v. Commissioner, T.C. Memo. 1982-336 (1982);Hall v. Commissioner, T.C. Memo. 1982-337 (1982); Kellman v. Commissioner, T.C. Memo. 1981-615 (1981);

Brown v. Commissioner, T.C. Memo 1980-553 (1980). Certainly both the Internal Revenue Service and the Tax Court were well aware of the Universal Life Church's method of operations. Yet it knowingly permitted that organization to remain tax exempt.

The Internal Revenue Service further refused, with the Tax Court's acquienscence, (App. B-3) to release to the Tax Court the full administrative record upon which the Internal Revenue Service based its decision on. Because the Tax Court based its decision on a different record than used by the Internal Revenue Service, it comes to no surprise that the Tax Court could state in reply to Petitioner's claim of unconstitutional discrimination by the Internal Revenue Service: "Consequently, on the record before us, respondent's denial of petitioner's application for tax exempt

status is far from being constitutionally infirm." (emphasis added).

The Internal Revenue Service also based its denial of Petitioner's tax exemption status on the fact that Petitioner's religious practices did not conform to the "14 criteria" required by the IRS to be met by a religion to be considered a "church". (App. C-9; C-18). Any religious organization that cannot meet the "14 criteria" or does not conform its religious beliefs to these government mandated requirements must subject itself to the administrative procedure and review underlying a application for tax exempt status, and even then is not granted "preferential treatment". See, Ecclesiastical Order of the Ism of Am, Inc. v. Internal Revenue Service, 725 F.2d 398, 403, fn. 1 (6th Cir. 1984).

The IRS refused to consider Petitioner's constitutional objections

initially; the Tax Court refused to consider those establishment, free exercise and due process/equal protection arguments of Petitioner; and the Court of Appeals also refused to address the constitutional issues raised.

Consequently, it appears that only this Court can compel the Internal Revenue Service and the lower courts to address this ongoing establishment of religion and its resulting suppression of new religions. Every day that the discrimination among religions remains embedded in the Internal Revenue Code causes irreparable damage to the most precious of our rights.

REASONS FOR GRANTING THE PETITION

This case presents important questions relating to the establishment of religion by not only the Internal Revenue Code, which blatantly discriminates in

favor of religions that are organized into churches, but also by the Internal Revenue Service's conduct in selectively granting tax exempt status to religious organizations that meet IRS approved religious beliefs, organization, speech, and membership; and its purposeful discrimination, against religious organizations that do not conform to the IRS approved religious tenents by denying those religions tax exempt status. This discrimination, as in this case, is sometimes accomplished by basing administrative rulings on the "secret" portions of the administrative record that are not presented to the Tax Court.

Further, it is apparent that the Tax Court has systematically engaged in a pattern of denying exempt status to new religious organizations that may be organized and operated differently than traditional churches, thus suppressing the

free exercise of religion and, via its application of the 14 IRS criteria, in effect establishing more traditional religions.

1. "CHURCH" TYPE RELIGIONS ARE IMPERMISSIBLY FAVORED OVER OTHER RELIGIONS.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson v. Valente, 456 U.S. 228, 224 (1982). Thus, there should be no laws that "aid one religion" or "prefer one religion over another." Everson v. Board of Education, 330 U.S. 1, 15 (1947). The Court has recoginzed the competition between [religious] sects, Zorach v. Clauson, 343 U.S. 306,314 (1952), and has clearly affirmed the principle that "government ... effect no favoritism among sects ... and that it work deterrence of no religious belief." Abington School District v. Schempp, 374 U.S. 203, 305 (1963). This is especially true when the Government places its financial support

behind certain religious beliefs, causing a suppression in the free exercise of religion by coercing "religious minorities to conform to the prevailing officially approved religion ... ." Engel v. Vitale, 370 U.S. 421, 431 (1962).

Yet there are provisions in the Internal Revenue Code that give preference to religions that have "distinct religious histories," a "literature of their own," a "formal code of doctrine and discipline" and which "require their members to renounce all former religious affiliations." These provisions in the Internal Revenue Code do not treat all religions equally, but distinquish between religions, classifying them into "churches" and "nonchurches". Thus they impermissibly favor and establish the religions that conform to the requirements set forth by the IRS for "churches" which, both on the face of the Internal Revenue

Code sections, and in their actual application, discriminate against the nonchurch religions. This is so, even though "church" is a vague term, which is never defined in the Internal Revenue Code. See, "Church" in the Internal Revenue Code: The Definitional Problems, Whelan, 45 Fordham L. Rev. 885 (1977).

For example, 26 U.S.C. 508 requires all religious organizations, other than churches to apply to the IRS for an exemption ruling in order to achieve status as a tax exempt organization:

> Section 508(c) exempts various organizations, including churches, from the notification requirements of section 508(a). Thus, while most organizations claiming tax-exempt status under section 501(c)(3) must inform the Commissioner of their application for exempt status (employing Form 1023) churches need not make such a notification. Failure to so notify the Commissioner results in disallowance of exempt status for those organizations not within the safe harbor provided by section 508(c). Churches which are within the safe harbor, however, need not notify the Commissioner to retain

their exempt status.

Universal Life Church (Full Circle) v. Commissioner 83 T.C. 292, 297 (1984).

Other Internal Revenue Code Sections that outright favor "churches" are: 26 U.S.C. 170(b)(1)(A)(i) (allowing a greater portion of a taxpayers income to be deducted for contributions to "churches") 26 U.S.C. 511-14 (limiting a "church's" liability for the tax on unrelated business income), 26 U.S.C. 3309 (limiting a "church's" liability for state unemployment taxes), 26 U.S.C. 6033 (specifying that a "church" has no obligation to file annual financial reports), 26 U.S.C. 6043(b)(1) (specifying that a "church" has no obligation to report a liquidation, dissolution, termination, or substantial contraction). See also, 26 U.S.C. 509, 501(h), 410(c) and (d), 411(e)(1)(B), 412(h)(4), and 414(e).

Some Internal Revenue Code Sections not only distinquish between religious organizations that are "churches" or closely connected with "churches" and those religious organizations that have no "church" status or connection, but also within the spectrum of "church" organizations themselves. Those Internal Revenue Code sections contain references to "churches and conventions or associations of churches", but not "integrated auxiliaries" of churches; other sections contain all three types of organizations, and many Internal Revenue Code sections refer explicitly to religious orders as a special category. 26 U.S.C. 1402(a)(8) and (c)(4), 3121(b)(8)(A), (i)(4), (r)(1) and (2), 3309(b)(2) 3401(a)(9), 512(b)(12) and (15), 6033(a)(2)(A)(iii), 170(b)(1)(A)(i), 410(d), 414(e)(1)(A) and (3)(A), 508(c)(1)(A), 512(b)(14), 514(b)(3)(E),

3309(b)(1), 6033(a)(2)(A)(i), 6043(b)(1) and 7605(c), 509(a)(1).

The above mentioned laws are plainly violative of the prohibition against anything other than the "strict neutrality" regarding different religious sects required by the Constitution. The manner in which a religion organizes itself to practice its beliefs is implicitly tied to the actual practice of its religion.

Of course, not only are the Internal Revenue Code Sections impermissibly discriminatory on their face, because they "make ... explicit and deliberate distinctions between different religious organizations ..." Larson v. Valente, 456 U.S. 246 at fn. 23, but in their application do indeed have a " 'disparate impact' upon different religious organizations." Id.

The three "tests" that a statute must

pass in order to avoid the prohibition of the Establishment Clause were set forth in Lemon v. Kurtzman, 403 U.S. 602 at 612-613 (1971):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, ... finally, the statue must not foster "an excessive governmental entanglement with religion."

In the present case, the "Lemon tests", should not even be reached, as those "tests" "are intended to apply to laws affording a uniform benefit to all religions, and not to provisions ... that discriminate among religions." Larson v. Valente, supra., at 252. All of the statutes, however, including the one most directly involved in the present case, 26 U.S.C. 508, do fail each of the "tests":

There is no secular reason to exempt churches from applying for exempt status while requiring other religious

organizations to apply. The same possible secular reasons for having nonchurch religions apply for exemptions, (such as to monitor fund-raising activities, to determine if there has been personal inurement, to determine if organization is, in fact, a "religious" one, to determine if the religion carries on non-exempt activities), would equally apply to "churches."

The second test, which requires that the primary effect of the requirement be neither to advance nor inhibit religion, clearly is violated by a requirement that exempts "church" religions from subjecting themselves to governmental examination. Just the burden of applying would chill the formation of nonchurch religions and promote and, in effect, establish "church" religions.

The statutory distinction between "church" and nonchurch completely fails

the third test of no excessive governmental entanglement with religions. Certainly the benefit conferred by tax exempt status constitutes a substantial advantage, and the burden to comply with the reporting requirment is not de minimis. The Internal Revenue Service has interpreted the law as requiring it to ask the following questions:

> "Describe a typical religious service conducted by your Church. Provide us with a list showing the date of each service you have conducted since your inception and the number of persons in attendance at each service." and
>
> "May an individual who is a member of another religion become a member of your Church? If so, on what basis? Is renunciation of former religious beliefs a pre-requisite to membership in your church?"

[These questions and others, equally offensive were put to Petitioner during the investigative stage of the Internal Revenue Service's administrative review, and the denial of Petitioner's tax exempt

status was based on the answers to those questions.]

There is no compelling governmental interest that could possibly be served by the asking of these questions, yet, even more disturbing, since at least 1978, the Internal Revenue Service has been preferring certain religions over others by the grant of exemptions and the waiver of reporting and registration requirements on the following criteria:

1. A distinct legal existence.
2. A recognized creed and form of worship.
3. A definite and distinct ecclesiastical government.
4. A formal code of doctrine and discipline.
5. A distinct religious history.
6. A membership not associated with any other church or denomination.
7. An organization of ordained ministers.

8. Ordained ministers selected after completing prescribed services.

9. A literature of its own.

10. Established places of worship.

11. Regular congregations.

12. Regular religious services.

13. Sunday schools for religious instruction of the young.

14. Schools for the preparation of its ministers.

This is clearly the "state inspection and evaluation of the religious content of a religious organization [that is] fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction ... ." Lemon v. Kurtzman, supra., at 620.

Certainly the grant of benefits by the Government, based on the necessary satisfaction of the above requirements, or the giving of the "correct" answers to the above questions, would amount to the

impermissible conferring of the "imprimatur of State approval on religious sects or practices." Widmar v. Vincent, 454 U.S. 263, 274 (1981). See also, Ideal Life Church of Lake Elmo v. County of Washington, 304 N.W. 2d 308, 317-20 (S. Ct. Minn. 1981); Holy Spirit Association for Unification of World Christianity v. Tax Commissioner of City of New York, 435 N.E. 2d 662, 663 (1982).

2. THE INTERNAL REVENUE SERVICE HAS PREFERRED SIMILARLY SITUATED RELIGIONS OVER PETITIONER.

The Tax Court itself in the instant case, has made it clear that tax exempt status under 26 U.S.C. 501(c)(3) cannot be withheld from one religion if another religion of the same class is enjoying that benefit:

> Nevertheless, unconstitutional discrimination might well arise if benefits granted to one religious group are denied to others of essentially the same class. (App.B-32)

The Tax Court allegedly based its decision that Petitioner was not tax exempt on the fact that Petitioner did not operate exclusively for exempt purposes. The activity that Petitioner engaged in that the Tax Court and the Court of Appeals held caused the denial of tax exempt status, was the "counseling [of] individuals, for specific "donations," on the purported tax benefits available to

ministers of the Ism of Am under the Internal Revenue Code." (App. B-24) Because the "counseling" was limited to Petitioner's ministers, the Court held that the Petitioner served private, rather than public purposes. (As explained more fully in section 4 of this Petition, the Tax Court seemed more concerned over the content of the "counseling" rather than the activity of "counseling" itself.)

First, and foremost, during the entire time that Petitioner was engaged in the administrative procedure, the Tax Court litigation, and the Sixth Circuit appeal, much more agressive tax counseling was carried on by the Universal Life Church. Yet the Internal Revenue Service never even raised its administrative eyebrows over those activities.

Presented to the Tax Court, and attached to the Briefs filed with the Court of Appeals for the Sixth Circuit

were numerous examples of tax counseling being engaged in by the Universal Life Church. For example, the Universal Life Church not only actually blatantly sells tax advice, but its advice goes so far as actually setting out verbatim the answers to each question by the Internal Revenue Service. Further, the Universal Life Church sells courses entitled "Tax Planning I, Tax Planning II and Tax Planning III." The Universal Life Church sells "canned" freedom of information requests packets, and ULC Tax Audit Seminars, Parts, I, II and III in which a member is instructed in step by step procedures how to handle a tax audit as it relates to ULC ministers, congregations and membership donations.

Thus, even if tax "counseling" could be considered as prohibiting tax exempt status, the Courts below and the Internal Revenue Service should still be called

upon to address the constitutional issue of whether tax exempt status can be denied to a religion that engages in the same or similar activity that has not caused the disallowance of tax exempt status to other organizations.

The Tax Court, however, faced with the fact that almost every religious organization engages in some sort of tax advice to its members, ("We are not holding today that any group which discusses the tax consequences of donations to and/or expenditures of its organizations is in danger of losing or not acquiring tax-exempt status" (App. B-34)), tried to limit its holding by stating that it was really only complaining about the amount of tax advice that was given by Petitioner: "Our holding today goes only to those organizations whose entire existence is permeated with the purpose of counseling taxpayers on tax

matters".(App. B-34).

The manifest danger with the Tax Court's belief that it can base the grant or denial of tax exempt status on the "amount" of tax advice activity is clearly shown in the instant case, where the Court critizes Petitioner for not having more religious writings in comparision to administrative writings. (Tax Court Opinion at Footnote 12. (App. B-26)).

In the instant case, as seen in section 3 below, Petitioner had previously advised the Internal Revenue Service of the various religious writings that it relied on, but the Internal Revenue Service would not release that part of the administrative record.

Because the Tax Court counted the words that discussed taxes, it impermissibly concentrated on the "activity" of giving tax advice, rather than the "purpose" behind that activity.

The statute itself states that it is the purpose, and not the activity, which must be exclusively religious. 26 U.S.C. 501(c)(3).

Thus, in determining whether an organization is operated exclusively for religious purposes, the objective nature of the organizations's activities is not dispositve. As the Tax Court itself noted in B.S.W. Group, Inc. v. Commissioner, 70 T.C. 352 (1978), "the purpose towards which an organization's activities are directed, and not the nature of the activities themselves, is ultimately dispositive of the organization's right ot be classified as a section 501 (c)(3) organization." Id. at 356-57.

Thus, the Tax Court has allowed a church to operate several businesses, including a laundry, a hotel, a nursery, a ranch and a sawmill and still be tax exempt. Golden Rule Church Association v.

Commissioner, 41 T.C. 719 (1964). The business activity was allowed because it was claimed to demonstrate to the world that the Church's teachings applied to daily business life. Id., at 721, 723-24.

The purpose behind Petitioner's giving tax advice to its members was to assist them in dealing with the complicated rules and regulations that the Internal Revenue Service has promulgated for non-traditional religions. Petitioner was duly concerned that the Internal Revenue Service would seek to harass its members by finding technical violations in the operation of their individual congregations.

Petitioner believed that in order to survive, it had to establish a good base of well educated ministers. The Tax Court second guessed Petitioner, and in effect is now telling other new religions that they have to meet the proper "mix" of tax

advice and religious writings, or lose their exemption. Such a ruling contradicts the very basis of the Bill of Rights set forth in the Constitution of the United States of America. Indeed, it violates the very spirit and intent of why this country declared its independence from England.

The Tax Court also equated the education of Petitioners ministers with violating the prohibition against serving private, as opposed to public, purposes. Despite the fact that a tax exempt religion is not permitted to serve private purposes, the Internal Revenue Service routinely grants tax exemptions to various monasteries, convents and religious orders, most of which are Roman Catholic, and are covered by the annual group exemption letter the Internal Revenue Service issues to the United States Catholic Conference. Additionally, in a

series of private letter rulings, the Service confirmed the tax-exempt status of eleven Cistercian monasteries. Private Letter Rulings Nos. 7838028-7838036 (June 21, 1978). One of the rulings notes that "[a]s long as [a] monk remains in [the] monastery ... he [will receive] food, shelter, clothing and medical care [for life]. Private Letter Ruling No. 7838028 (June 21, 1978).

Further, the Internal Revenue Service has determined that the public interest requirement can be met by serving the interest of the individual members of religious organizations. See Rev. Rul. 73-285, 1973-2 C.B. 174 (public interest served by organization providing funds to defend legal suits against sect members prosecuted for violations caused by religious practice), Rev. Rul. 56-403, 1956-2 C.B. 307 (foundation awarding scholarships to select fraternity served

public interest.).

If 26 U.S.C. 501(c)(3) is interpreted to require an organization to do more than serve the needs of its immediate membership, such a requirement would be a violation both of the Free Exercise and the Establishment Clause not only by coercing a particular form of religious expression, See Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961), but also by discriminating between religions on the basis of whether their doctrines coincide with the IRS's concept of a contribution to the public interest. See Universal Life Church, Inc., v. United States, 372 F. Supp 770 , 776 (E.D. Cal. 1974).

3. THE TAX COURT DID NOT REVIEW THE SAME ADMINISTRATIVE RECORD AS USED BY THE INTERNAL REVENUE SERVICE TO MAKE ITS ADMINISTRATIVE DECISION.

26 U.S.C. 7428 permits the Tax Court and District Courts to review the determination of the Internal Revenue Service on the exempt status of non-profit organizations, including religious organizations.

During the Tax Court proceedings below, it became clear that the Internal Revenue Service based its administrative determination on a different administrative record than was used by the Tax Court to make its decision. The administrative record used by the Internal Revenue Service contained certain materials, including notes taken at conferences in Washington, D.C., that were not contained in the record reviewed by the Tax Court. Specifically lacking in the

Tax Court's version of the Administrative Record were the discussions between Petitioner and the Internal Revenue Service during administrative conferences in Washington, D.C., regarding the similarity between Petitioner and the tax exempt Universal Life Church. The Internal Revenue Service had promised to record the administrative proceedings, and did in fact do so, by the notekeeping of its officers in charge of the hearing. Those notes, though used in the Internal Revenue Service's administrative determination, were not transmitted to the Tax Court for its consideration during the Declaratory Judgment action under 26 U.S.C. 7428. Thus, the Tax Court did not review the same administrative record used by the Internal Revenue Service.

The void in the Administrative record created by the Internal Revenue Service is important because the Tax Court based its

decision on the incorrect finding that Petitioner never claimed that it had been patterned after the Universal Life Church, which is tax exempt:

> Petitioner has not suggested that there exists, and, we submit, cannot find, a single instance in which respondent has granted tax-exempt status to a religious organization that carried on activities similar to petitioner's. Consequently, on the record before us, respondent's denial of petitioner's application for tax exempt status is far from being constitutionally infirm. (App. B-33)

There are presented two issues of administrative law that must be decided:

First, must the Tax Court in a declaratory judgment action under 26 U.S.C. 7428 review and base its decision on the same identical record as used by the Internal Revenue Service when it made its administrative decision.

Second, does the Administrative Procedure Act apply to the adjudicatory administrative proceedings and hearings conducted by the IRS while making its

decision on the tax exempt status of an organization.

The Tax Court rules provide that during a hearing conducted pursuant to 26 U.S.C. 7428, it cannot look any further than the "Administrative Record" as defined by Tax Court Rule 210(b)(11). That rule states that only records actually submitted to the Internal Revenue Service by the taxpayer may be considered the "Adminstrative Records." What was intended by the Tax Court by adopting the Rule was:

> it is essential that such record contain all the material upon which the Commissioner based his determination. Prefatory Note 64 TC 1177 at 1179.

Both houses of Congress upon enacting 26 U.S.C. 7428, approved of and made direct reference to the Tax Court's previous requirement in declaratory judgment actions that the same record used by the Internal Revenue Service be reviewed by the Tax Court. See S. Rep.

No. 938, 94th Cong., 2d Sess. (1976) at Footnote 7, and H.R. Rep. No. 658, 94th Cong., 1st Sess. (1975) at Footnote 7.

Justice Cardozo emphasized the importance that both records be identical when he stated in Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 303 (1937):

> [H]ow was it possible for the Appellate Court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?

Besides the obvious reasons for a reviewing court to have the same administrative record before it as that used by the administrative agency in making a decision, in a proceeding conducted pursuant to 26 U.S.C. 7428, the evidentiary facts and representations contained in the administrative record are assumed to be true for the purposes of the proceeding. People of God Community v.

Commissioner, 75 T.C. 127, 128 (1980). Tax Court Rule 217(b)(1). Thus, an allegation by the Petitioner in the instant case that its activities were identical to the activities of a tax exempt organization would have had to be taken as true.

The IRS, of course, contends that it had no responsibilty to provide for a transcript, or had any duty to provide the records it kept during the administrative hearings, despite the fact that this contention is in direct conflict with the requirements of the Administrative Procedure Act. 5 USC 554 provides that if the administrative adjudication is required to be determined "on the record" after an opportunity for an agency hearing, then the Administrative Agency should hold a hearing that meets the requirements of 5 USC 556. At the least, there should have been some clear

provision for the recording of evidence and a from the agency that was based on the evidence. The present procedure that the Internal Revenue Service uses in 26 U.S.C. 7428 administrative proceedings, is to hold a hearing in Washington, D.C., accept oral testimony from taxpayers, record that oral testimony in note form, base its decision on those notes, then refuse to transmit them to the Tax Court. The Tax Court then refuses to compel the transmittal of those notes, because the it claims that its administrative record is limited to the materials that the taxpayer submits. (App.B-5 - 7). Thus, the Tax Court understands that it must be reviewing an incomplete record each time it decides a 26 U.S.C. 7428 action.

If the Internal Revenue Service procedures were subjected to the Administrative Procedure Act, a record would have to be kept of the

administrative hearing. In United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972), the Court held that it was not necessary that the statute referring to the type of hearing contain the "precise words 'on the record'" to make sections 556 and 557 applicable. Further, the case of United States v. Florida East Coast R. Co., 410 U.S. 224, 245 distinquished between what type of proceeding was required by the Administrative Procedure Act, when there was adminstrative rulemaking, compared to the type of adjudicatory type of hearing that was present in the instant case.

Thus, it is clear that the administrative proceedings envisioned by Congress under 26 U.S.,C. 7428 were "adjudicatory" type proceedings that were to be reviewed on the record. The proceedings held by the Internal Revenue Service in the instant case (and in all

cases of this type) do not the meet the requirements of 5 U.S.C. 556 because the Internal Revenue Service fails at minimum, to keep a record of the proceedings before it and to submit that record to the reviewing Court. For the Tax Court to properly review a proceeding under 26 USC 7428, it must know "what factors or data were in fact considered by the [IRS]." U.S. Lines v. Federal Maritime Commission, 584 F.2d 519 (D.C. Cir. 1978).

The Tax Court has recently addressed the issue of whether the Adminstrative Procedure Act applies to a proceeding under 26 U.S.C. 7428 in Universal Life Church (Full Circle) v. Commissioner, 83 T.C. 292 (1984). Although in that case the Court did not base its holding on that issue, it refuted the Internal Revenue Service's argument that the Administrative Procedure Act did not apply to it by stating that such proceedings were not de

novo. 83 T.C. 292, 300 at Footnote 19.

4. PETITIONER WAS DENIED ITS TAX EXEMPTION BECAUSE OF THE CONTENT OF ITS SPEECH.

It is clear from the Tax Court's opinion in the instant case that Petitioner was being punished for the content of its speech. The Tax Court was more concerned that the tax advice given by Petitioner was "incorrect" than by the fact that it was actually given. For example, in Footnote 12 of the Tax Court's opinion, the Tax Court stated: Petitioner's "instructions" focus on maximum tax benefits; no consideration is given to the "reasonableness" limitation."

Additionally, the Tax Court complained that Petitioner's advice to its members that:

> "a religious organization's disbursements to its ministers, regardless of amount, cannot be successfully challenged by [the IRS] has been repeatedly rejected."

The Tax Court attempted to cloak its

censorship by stating that there is a difference between informing members about tax benefits, and suggesting "innumerable" methods by which tax benefits could be maximized. Thus, the Tax Court implicitly indicated that if the content of Petitioner's speech had been different, if it had complied with the IRS's "approved" version, if it had given the IRS's version of the tax laws equal time, then Petitioner would have received its tax exempt status.

What the Tax Court has done, by reviewing Petitioner's speech for content, is to foster "entanglement" by ruling on the "correctness" of the content of the communication between Petitioner and the members of its religion. The situation of the Tax Court in the present case is similar to the one expressly forbidden by this Court in Widmar v. Vincent, 454 U.S. 263 (1981). In that case, this Court

warned a University against taking it upon itself to distinquish between "religious worship" and "religious speech." This Court stated: "This alone could prove 'an impossible task in an age where many and various beliefs meet the constitutional definition of religion.'" Id. at Footnote 11, citing O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979).

In fact, it is clear from the opinion that the Tax Court confused Petitioner's religious statements with what the Tax Court believed was tax advice. The Court, in Footnote 13, of its opinion, (App. B-27) pointed out:

> We recognize that some of petitioner's literature is relatively devoid of the tax avoidance message. For example, both "The Book of Am - The Enlightenment" and the pamphlet "The Proof of AM" mention taxes only once, in a sentence which states that, "[m]oreover, beyond the possession of such power over others, the church is materially the richest corporation in the world and for the most part pays no taxes." However, the rest of petitioner's literature contains so many suggestions and

> recommendations regarding maximizing tax benefits that one cannot but conclude that a substantial nonexempt purpose permeates the literature taken as a whole.

The above statement, contained in Petitioner's writings, is an important part of Petitioner's Deistic religious belief that it is morally wrong for religions organizations to acquire wealth, and such wrong is further compounded by the fact that most organized religions are being supported in their acquisition of such wealth by the Government through tax exemptions.

The Tax Court, however, interpreted these religious messages as a "tax avoidance message." This misunderstanding by the Tax Court underscores the reason our founding fathers wanted to separate the church and the state in the first place.

For example, how would the Tax Court, in picking through the writings of the

Catholic Bible, interpret the following writing, from Mark, Chapter 12:

> They next sent some Pharisees and Herodians after him to catch him in his speech. The two groups came and said to him: "Teacher, we know you are a truthful man, unconcerned about anyone's opinion. It is evident you do not act out of human respect but teach God's way of life sincerely. Is it lawful to pay the tax to the emperor or not? Are we to pay or not to pay?" Knowing their hypocrisy he said to them, "Why are you trying to trip me up? Bring me a coin and let me see it." When they brought one, he said to them, "Whose head is this and whose inscription is it?" "Caesar's," they told him. At that Jesus said to them, "Give to Caesar what is Caesar's, but give to God what is God's." Their amazement at him knew no bounds.

The New American Bible, Catholic Book Publishing Co. (1970).

Because Jesus was talking about the subject of taxes, does that give the Tax Court even the right to review the writings and decide if Jesus's words had a religious content or a "tax advoidance" content? One would hope not.

But, pursuant to the Tax Court's

opinion there now exists a vague content requirement for religious writings that is "so unclear as to afford latitude for subjective application by IRS officials." Big Mama Rag, Inc. v. United States, 631 F. 2d 1030, 1034 fn. 78 (D.C. Cir. 1980). Such vague requirements or rules must be struck down when they:

> require [those subject to them] to "steer far wider of the unlawful zone," than if the boundaries of the forbidden areas were clearly marked, ... by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited. Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

Further, the Tax Court seems to be applying a "test" based on the number of of "religious" words contained in a religion's writings, as compared to "administrative" words. Such a test cannot but favor older, traditional religions, with greater religious works. Further, such a test will favor religions that perhaps have more complicated

beliefs, or require more explanation. Also, religions would have to incorporate into the administrative record, and therefore turn over to the Internal Revenue Service for its review, all of their religious writings in order to attempt to meet some nebulous "weight" test.

Not only do the Internal Revenue Service and the Courts have no legitimate interest in perusing through anyone's religious writings, but such writings, or the extent thereof, should have no bearing on whether a religion is determined to be tax exempt. It is clearly violative of the Free exercise clause and the Establishment clause to have any requirement that religious beliefs be put down in writing, much less proscribe the extent of such beliefs.

Perhaps this is why the Tax Court usually never rules in favor of new

religions when deciding whether an exemption under 26 U.S.C. 501(c)(3) should be granted. Basic Bible Church of America v. Commissioner, T.C. Memo 1983-287 (1983); Parshall Christian Order v. Commissioner, T.C. Memo 1983-11 (1983); New Life Tabernacle v. Commissioner, T.C. Memo 1982-367 (1982); Truth Tabernacle v. Commissioner, T.C. Memo 1981-214 (1981); Universal Life Church Inc., (Full Circle) v. Commissioner, 83 T.C. 292 (1984), National Association of American Churches v. Commissioner, 82 T.C. 18 (1984); Church of Transfiguring Spirit, Inc., v. Commissioner, 76 T.C. 1 (1981); Schoger Foundation v. Commissioner, 76 T.C. 380 (1981). But see, Alive Fellowship of Harmonious Living, T.C. Memo 1984-87 (1984).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH FALCONE

84-1053

NO.

Office-Supreme Court, U.S.
FILED
JAN 2 1985
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1984, TERM

THE ECCLESIASTICAL ORDER
OF THE ISM OF AM, INC., PETITIONER

V.

COMMISSIONER OF INTERNAL REVENUE

- APPENDIXES A and B -

TO THE
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH FALCONE

4000 Town Center
Suite 500
Southfield, MI 48075
(313) 357-0666

ATTORNEY FOR PETITIONER

84-1033

TABLE OF CONTENTS

APPENDIX A

OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS.....A-1

ORDER DENYING PETITION FOR REHEARING ENBANC.....A-5

APPENDIX B

ORDER OF THE UNITED STATES TAX COURT DENYING MOTION TO SUPPLEMENT THE RECORD.....B-1

MEMORANDUM SUR ORDER OF UNITED STATES TAX COURT DENYING MOTION TO SUPPLEMENT THE RECORD.....B-3

OPINION OF THE UNITED STATES TAX COURT.....B-9

DECISION OF UNITED STATES TAX COURT.....B-36

ORDER AND OPINION OF UNITED STATES TAX COURT DENYING MOTION FOR RECONSIDERATION.....B-37

ORDER AND OPINION OF UNITED STATES TAX COURT DENYING MOTION TO VACATE OR REVISE THE DECISION.....B-39

APPENDIX C

ADMINISTRATIVE RULING
OF THE IRS INTIALLY
DENYING REQUEST FOR
TAX EXEMPT STATUS.....C-1

FINAL ADMINISTRATIVE
ADVERSE RULING OF THE
IRS DENYING REQUEST FOR
TAX EXEMPT STATUS.....C-17

APPENDIX D

26 USC 170(b).....D-1

26 USC 501.....D-2

26 USC 508.....D-4

26 USC 509.....D-6

26 USC 7428.....D-7

5 USC 554.....D-9

5 USC 556.....D-14

5 USC 706.....D-15

TAX COURT RULE 210(b)(11).....D-17

TAX COURT RULE 217(b).....D-18

FIRST AMENDMENT TO
THE UNITED STATES
CONSTITUTION.....D-20

FIFTH AMENDMENT TO
THE UNITED STATES
CONSTITUTION.....D-20

83-1484

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE ECCLESIASTICAL ORDER OF THE ISM OF AM, INC.,

Petitioner-Appellant,

On Appeal from the United States Tax Court

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Decided and Filed July 31, 1984

BEFORE: LIVELY, Chief Circuit Judge, KEITH, Circuit Judge, and ALLEN*

PER CURIAM. Appellant, the Ecclesiastical Order of the Ism of Am, Inc., appeals from the decision of the United States Tax Court sustaining the determination of the Commissioner of Internal Revenue that

---

*Chief Judge Charles M. Allen, U.S. District Court, Western District of Kentucky, sitting by designation.

appellant was not an exempt organization under §501(c)(3) of the Internal Revenue Code, 26 U.S.C. §501(c)(3). For the reasons set forth below, the decision of the Tax Court is affirmed.

On January 15, 1980, appellant filed with the Internal Revenue Service (IRS) an Application for Recognition of Exemption, Form 1023. Appellant sought recognition of exemption from federal income tax under §501(c)(3) of the Internal Revenue Code as a religious organization.

83-1484 pc p2

After several written and oral discussions with the church about its status as a religious organization, the IRS issued its final denial of the application on February 18, 1981.

The IRS found that the Ism of Am in its literature entitled Untaxable I-III emphasized almost exclusively tax

advantages and how to illegitimately avoid income taxes. The IRS also considered the organization's fee schedule for purchasing religious titles before concluding that the Ism of Am did not operate for an exempt purpose under the Code and was not a church under §501(c)(3).

The organization filed a petition for declaratory judgment with the United States Tax Court. The Tax Court upheld the Commissioner's determination that the Ism of Am was not a church operated exclusively for an exempt purpose under §501(c)(3). The organization then filed this appeal.

Based upon the thoughtful and thorough opinion of the United States Tax Court, reported at 80 T.C. 833 (1983), we affirm the denial of exempt status under §501(c)(3) of the Internal Revenue Code, 26 U.S.C. §501(c)(3).

ISSUED AS MANDATE: October 23, 1984

COSTS: Appellee to recover

Printing costs $29.60

No. 83-1484
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ECCLESIASTICAL ORDER OF THE ISM OF AM, INC.,

Appellant

vs.

ORDER DENYING PETITION FOR REHEARING EN BANC

COMMISSIONER OF INTERNAL REVENUE,

Appellee

BEFORE: LIVELY, Chief Circuit Judge and
KEITH, Circuit Judge and
ALLEN, Chief District Judge*

A majority of the judges of the Court not having favored rehearing en banc, the petition for rehearing en banc has been referred to the hearing panel for disposition.

Upon consideration, the Court concludes that the petition for rehearing

---

*Chief Judge Charles M. Allen, U.S. District Court, Western District of Kentucky, sitting by designation.

en banc is without merit. Accordingly, it is ORDERED that rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

October 15, 1984

UNITED STATES TAX COURT

THE ECCLESIASTICAL ORDER OF THE ISM OF AM, INC., Petitioner,	)
v.	Docket No. 10769-81 X
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)

O R D E R

For the reasons appearing in the Memorandum Sur Order served herewith, it is

ORDERED that petitioner's Motion for More Definite Statement, filed on August 24, 1981, is denied. It is further

ORDERED that petitioner's Motion to Supplement the Record, filed on September 21, 1981, is denied. It is further

ORDERED that the following requests, contained in petitioner's Motion to Supplement the Record, are denied:

(1) Petitioner's request to obtain

discovery; and

(2) Petitioner's request for a trial.

(Signed)Francis J. Cantrel

Special Trial Judge

Dated: Washington, D.C., Sept. 23, 1981

UNITED STATES TAX COURT

THE ECCLESIASTICAL ORDER OF THE ISM OF AM, INC.,

Petitioner,

v.

Docket No. 10769-81 X

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MEMORANDUM SUR ORDER

This case was called from the calendar for the Motions Session of the Court at Washington, D.C., on September 23, 1981, for hearing on petitioner's Motion for More Definite Statement, filed on August 24, 1981. On September 21, 1981, petitioner filed a Motion to Supplement the Record, which the Court directed to be argued today, and counsel for the parties were so informed by a representative of the office of the Clerk of the Court. Respondent's counsel appeared at the hearing and presented argument. The Court also had before it

for its consideration petitioner's statement pursuant to Rule 50(c), filed on September 21, 1981, and respondent's Memorandum in Opposition to Petitioner's Motion for More Definite Statement, filed on September 16, 1981. At the conclusion of the hearing the Court took petitioner's motions under advisement.

Petitioner seeks to have us direct respondent to file a further and better statement of his Answer respecting paragraphs 3, 4, 7, 8(H) to (N), 10, and 11 since respondent's answers contain mere denials (1) without reasons thus making the answer in those respects (2) so vague and ambigious that petitioner cannot reasonably frame a responsive pleading thereto.

Rule 213 (a)(2), Tax Court Rules of Practice and Procedure,[1] provides in

---

[1] All rule references are to the Tax Court Rules of Practice and Procedure.

pertinent part that the answer "shall contain a specific admission or denial of each material allegation of the petition." Respondent has done precisely that. He is required to do no more. There is no requirement, in these circumstances, where the burden of proof is upon petitioner under Rule 217(c)(2)(i), that respondent provide a reason for each denial in the complained of paragraphs. Petitioner's Motion for More Definite Statement, filed on August 24, 1981, will be denied.

We next turn to petitioner's Motion to Supplement the Administrative Record. Petitioner contends that the administrative record is not complete and requests that respondent's written memoranda of a conference held on December 10, 1980, be included in the administrative record.

Respondent contends, relying on Houston Lawyer Referral Service, Inc. v.

Commissioner, 69 T.C. 570 (1978), that oral representations made at conference are not part of the administrative record and, furthermore, if petitioner wanted a written memorandum of the conference included in the administrative record, it should have submitted one to respondent during the administrative process. Respondent further argues the petitioner's Freedom of Information Act request is an attempt to circumvent the declaratory judgment rules.

Rule 210(b)(1) defines the administrative record as including all documents submitted to the Internal Revenue Service and all written correspondence between the parties. That definition does not include internal memoranda of a party and interagency memoranda. Furthermore, oral representations are not a part of the administrative record, even though the

statements were made at a conference with respondent. Houston Lawyer Referral, supra at 575. Petitioner's request to supplement the administrative record will be denied.

Petitioner's request to obtain discovery of other internal memoranda is likewise denied since this Court's review in declaratory judgment actions not involving revocations is limited to the items contained in the administrative record as defined by Rule 210(b)(11). Furthermore, petitioner's argument that it relied on respondent's representations that he would preserve oral statements in writing is unfounded where Houston Lawyer Referral was filed on January 19, 1978, giving petitioner more than adequate notice concerning the status of oral representations before its December 10, 1980, conference.

Petitioner's request for a trial will

likewise be denied since Rule 217(a) and (b) allows the submission of additional evidence only upon the showing of good cause, which is not present here.

(Signed) Francis J. Cantrel

Special Trial Judge

Dated: Washington, D.C.
September 23, 1981

80 T. C. No. 43

UNITED STATES TAX COURT

THE ECCLESIASTICAL ORDER OF THE ISM OF AM, INC., Petitioner
v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 10769-81X. Filed May 2, 1983.

Petitioner seeks a declaratory judgment that it is entitled to tax-exempt status as a religious organization under section 501(c)(3). Petitioner recruits new members by emphasizing to a great extent the tax benefits of becoming a minister in petitioner's "religion." Tax avoidance counseling permeates petitioner's literature. Held, petitioner is not entitled to exemption from Federal taxation under sections 501(a) and 501(c)(3), I.R.C. 1954, as amended, because it fails the operational test of section 501(c)(3) in that petitioner's tax counseling serves a substantial nonexempt purpose.

Joseph Falcone, for the petitioner.

Alan C. Levine, for the respondent.

OPINION

TANNENWALD, Chief Judge: This is an action for declaratory judgment pursuant to section 7428.[1] Petitioner filed an application for recognition of exemption from Federal income tax on January 15, 1980, seeking exemption under section 501(c)(3) and claiming to be a church within the meaning of sections 509(a)(1) and 170(b)(1)(A)(i). After a lengthy administrative review, respondent, on February 18, 1981, issued an adverse ruling which stated in part that --

> You are not operated exclusively for religious or any exempt purpose described in section 501(c)(3) of the Code. You are not operated in such a manner that no part of your net earnings will inure to the benefit of any individual. In addition,

---

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code as amended and in effect and all references to Rules are to the Tax Court Rules of Practice and Procedure.

you are operated for private rather than public interests. We have also determined that if you were described in section 501(c)(3), you would be a private foundation because you are not a church within the meaning of section 170(b)(1)(A)(i), the only basis upon which you claim non-private foundation status.

Petitioner then timely filed its petition herein.

This case was submitted fully stipulated pursuant to Rule 122. The administrative record filed by respondent is incorporated herein by this reference. See Rule 217.

Petitioner was incorporated in Michigan in 1978. Its officers are Rev. George N. Baustert, president, Cardinal Chalmers O. Smith, vice-president, and Janette C. Schwedt, secretary-treasurer.[2]

Petitioner is composed of a home

---

[2] Petitioner's officers are apparently unrelated. However, Rev. Baustert and Ms. Schwedt live together and Ms. Schwedt was described by petitioner, in correspondence with respondent, as Rev. Baustert's "companion and confidant."

office and approximately 26 chartered orders. At times, petitioner contends that each order is a separate entity; at other times, petitioner appears to suggest that all orders are part of a single entity. It is clear, however, that only the home office is a party to the present action.[3]

Petitioner conducts an active campaign for followers. Originally, petitioner sought converts through a pamphlet entitled "The Proof of Am," which explains the Ism of Am's deistic beliefs.[4] No one converted, however, because, as petitioner candidly admits, "[s]omething

---

[3] By letter dated July 15, 1980, petitioner expressly declined to apply for a group ruling.

[4] For purposes of this opinion, we accept as true petitioner's contention that its deistic beliefs are, in fact, held. Similarly, we accept as true the petitioner's descriptions of its "religious" activities.

was missing!" After studying materials developed by the Universal Life Church, Rev. Baustert wrote new literature and instituted several refinements in petitioner's method of operations. These changes greatly enhanced petitioner's recruitment effort.

The new recruiting approach developed by petitioner emphasizes to a great extent the tax benefits of becoming a minister in the Ism of Am. This emphasis is illustrated in the "education" given to new ministers, in the materials distributed by petitioner to potential converts, and in the training given to petitioner's "membership counselors."

Degrees and/or titles are awarded by petitioner to ministers upon completion of each of four stages of the "Phases of Awareness." Although certain pamphlets are provided with each "phase," no check is provided to assure that each minister

studies and understands them. However, some of these pamphlets are, no doubt, studied very carefully, for, as petitioner observes, completion of the "Phases of Awareness" assures that "you will be an expert in the administration and benefits of a Chartered Order of ISM of AM." (Emphasis added.)

Petitioner's "Awareness" program is structured as follows:[5] For a "donation" of $25 (Phase I) one is ordained as a Minister in the Ism of Am. Each new minister receives instructions entitled "Ecclesiastical Orders of Law I" and a copy of "The Book of Am -- The Enlightenment."[6] For a "donation of $75

---

[5] The "Phases of Awareness" are discussed in detail in petitioner's recruiting brochure entitled "The Existence of Am."

[6] Each new minister also receives an 8" x 10" Credentials of Ministry Certificate "ready for framing," a "personal signant of the ISM OF AM key ring (suitable for converting to a neckless)" [sic], and instructions for performing civil wedding ceremonies.

(Phase II) one receives a Doctorate of Divinity degree and a "Legal Charter * * * complete with federal and state exempt numbers." Instructions provided include "Ecclesiastical Orders of Administration I" and "Untaxables I." For a "donation" of $50 (Phase III), one is bestowed with a Certificate of Bishop and instructions entitled "Untaxables II." Finally, for a "donation" of $50 (Phase IV) one is canonized to Cardinal. Instructions received include "Untaxables III" and "Share with Am."

The "instructions" that accompany each phase discuss, in great detail, the tax benefits of being a minister in the Ism of Am. Nothing would be gained by describing these documents in detail; a few examples reveal their tenor. Untaxables I begins with the self-serving caveat that "The Ism of Am is not a tax reform movement, and it is important to

note that it is not our intention to teach you how to evade taxes." The pamphlet then provides, inter alia, a laundry list of personal expenses incurred by the minister that the order can pay as part of the minister's housing allowance. Lest anyone be concerned about the propriety of such actions, the pamphlet goes on to state that --

> It may seem that, if one starts a Chartered Order, donates money, and then uses the money to benefit the officers of the Order, this action might be considered "Self Dealing". Had you decided to form your own church wherein you would be responsible for control of the entire church, the problem of "Self Dealing" might be very real. However, since your Chartered Order is as much an Order of the ISM of AM as the Home Office, you need not be concerned about self dealing. All ministers of the ISM of AM are members of and make contributions to The Ecclesiastical Order of the ISM of AM, Inc. What the Order does with these contributions is of no concern to others outside of the Order. Not all donations donated to the Catholic Church are required to be sent to the Pope. [Emphasis added.]

Untaxables II further "educates" one in the "benefits" of being a minister in the

Ism of Am. In an illuminating passage,

Untaxables II states that --

Being a Minister of AM, you are entitled to be reimbursed for using your personal auto for Order related business. However, you will be required to keep daily records of this useage since, unlike the Minister's housing allowance, all money received by the Minister as an auto allowance is considered TAXABLE income to the Minister. The Minister is allowed to deduct 17 ¢ per mile for the first 15,000 miles, and 10 ¢ per mile for all mileage over 15,000, for all mileage driven on church related business.

Most Ministers prefer to have their Order own the auto, and be authorized as the Minister of the Order, to exclusive use of the vehicle. This way the Order is responsible to pay all associated operational costs, including gas, oil, insurance, license and registration fees, as well as maintenance and repairs. This is possible only if the vehicle is used primarily in Order work. Since you as the Minister are always seeking new members to "Share With Am" everywhere you go, the auto is indeed being used for the benefit of your Chartered Order, and the free use of the auto IS NOT considered taxable income to the Minister. [Reproduced literally; emphasis added.]

In another illuminating passage,

Untaxables II states that --

THE FAMILY OF AM

Being a Minister of AM, you are now

privileged to have your Chartered Order provide you, as the minister, with a home, food, clothing, insurance, travel expenses, etc. However, under the law, your order is not authorized to provide your wife and/or children with their worldly needs. Of course your wife and children, 18 years or older, are privileged to become Ministers of AM in their own right and enjoy the benefits guaranteed by law to a Minister of a Chartered Order, nonetheless, your children and/or congregational members that are younger than 18 years are not eligible for tax exempt compensations from your order. But, by the law, your Order is authorized to pay for any maintenance, improvements or repair to your home, as provided by your Order, and may very well hire your children for such services without regard as to the amount of payment. As long as none of these children receive more than $2,600 per annum, they are not required to even file income tax returns. They can use these earnings to provide for themselves the necessities and pleasures that you as the Minister are not authorized to provide them with on a direct basis, using your Chartered Orders' assets. [Reproduced literally; emphasis added.]

Untaxables III advises that "there is a way * * * to significantly reduce the amount of withholding taxes taken from [your] paychecks. Ministry in the ISM of AM is the answer." (Emphasis added.)

Orders of Law I claims that "The wealthy

families in this country have taken advantage of the tax laws of this country for more than two centuries. It is for this reason that we do not have to explain or defend our actions regarding the avoidance of taxes." (Emphasis added.) Orders of Administration I states that "[e]ach Chartered Order is granted the PRIVILEGE of using the Federal and State identification numbers and the TAX EXEMPT status of the Home Office. This relieves the Charter Order of the responsibility of dealing with the IRS."[7] The pamphlet also contains the jingle "Run your business with businesslike finesse, and you'll never be the business of the IRS."

---

[7] Similarly, petitioner's "charter agreements," which are presented to each new order in Phase II, provide that "the order is privileged to maintain a nonprofit status utilizing the corporate numbers of the Home Office. State No. 707-598. IRS number 38-2257252." However, the "IRS number" referred to is not, as petitioner seems to imply, a "tax-exempt" number (see p.5, supra); it is merely an employer identification number.

(Emphasis in original.) Similarly, the pamphlet "The Rational Religion of Rational Humankind," which is distributed to potential converts to "set[] the attitude for acceptance of the I AM U + U AM I Vow" (emphasis added), states, "we would be remiss in our duties if we did not provide for our ministers and members to participate in the FREE RIDE being given to the Pope, Billy Graham, Ms. Carter, ad infinitum."

The "training" given to a membership counselor consists of instructing the minister to review the materials provided in the four "Phases of Awareness"[8] and having him or her take a "licensing examination" which is "graded" at the home office and then returned to the "licensed"

---

[8] Therefore, only cardinals, who have "donated" $200 to petitioner, are eligible to become membership counselors.

counselor for reference purposes.[9] Of the 42 true/false and 8 multiple choice questions asked before a minister can become a membership counselor, virtually all deal with some aspect of tax law or administration procedure. For example, question 15 "asks": "The maximum deduction in any one year, a person can take on their income taxes is 50% of adjusted gross income," and question 45 "asks": "The best financial benefits will accrue to the minister who: (A) Receives a normal salary and use of an Order-owned vehicle[;] (B) Receives a rental allowance and an auto allowance[;] (C) Receives a rent-free living quarter and uses an Order-owned vehicle[;] (D)

---

[9] Petitioner provides the minister with a strong financial incentive, in addition to any nonpecuniary gratification he or she might receive, to recruit new members. As "The Existence of Am" pamphlet explains, a membership counselor "earn[s] a tax free income for [his or her] Order of $100.00 for each new member" he or she brings in.

Receives a housing allowance and an auto allowance[.]" Several questions seek to reinforce, in the minds of the prospective membership counselors, the "legality" of petitioner's tax benefits. For example, question 19 "asks": "Federal government has the right by law to determine if a particular Order is legal or not," and question 31 "asks": "The ISM of AM will defend its chartered congregations against an attack by the IRS."

To qualify for exemption under section 501(c)(3), petitioner must show (1) that it is organized and operated exclusively for religious or charitable purposes, (2) that no part of its earnings inure to the benefit of a private individual or shareholder, and (3) that no substantial part of its activities consists of the dissemination of propaganda or otherwise attempting to influence legislation or engaging in

political activity. Section 1.501(c)(3)-1, Income Tax Regs.

Respondent contends that petitioner is not exempt because (1) it is operated for the substantial nonexempt purpose of encouraging the avoidance of payment of Federal income taxes, (2) its net earnings inure to the benefit of its members, and (3) it serves private, rather than public, interests.[10]

Section 501(c)(3)'s operational test requires that an organization's activities primarily serve one or more exempt purposes and not, except to an insubstantial degree, a nonexempt purpose. Section 1.501(c)(3)-1(c)(1), Income Tax Regs. The existence of a "single * * *

---

[10] Respondent also argues that even if we are to find that petitioner is tax exempt under section 501(c)(3), petitioner is not excepted from foundation status under section 509(a)(1) because petitioner has failed to show that it is a church within the meaning of section 170(b)(1)(A)(i).

[nonexempt] purpose, if substantial in nature, will destroy the exemption regardless of the number or importance of truly * * * [exempt] purposes." Better Business Bureau v. United States, 326 U.S. 279, 283 (1945). See also, Presbyterian & Reformed Publishing Co. v. Commissioner, 79 T.C. 1070 (1982); Copyright Clearance Center v. Commissioner, 79 T.C. 793 (1982); Basic Bible Church v. Commissioner, 74 T.C. 846 (1980); First Libertarian Church v. Commissioner, 74 T.C. 396 (1980).

We find that petitioner is not operated exclusively for exempt purposes under section 501(c)(3). Petitioner's substantial nonexempt purpose consists of counseling individuals, for specific "donations," on the purported tax benefits available to ministers of the Ism of Am under the Internal Revenue Code. This counseling is clearly not religious, nor

does it qualify as "educational" within the context of section 501(c)(3). Even if one assumes that the tax information disseminated by petitioner is not misleading or distorted (an assumption that is at least dubious),[11] the information is no different from that furnished by a commercial tax service, albeit within a narrower field (i.e., tax benefits to ministers and churches) and a narrower class of customers (i.e., petitioner's ministers). Consequently, petitioner serves private, rather than public, purposes. See Christian Stewardship Assistance v. Commissioner, 70 T.C. 1037, 1041 (1978). Moreover, petitioner's premise that a religious

---

[11] Petitioner repeatedly seeks to convince potential converts that the organization is tax exempt (see n.7, supra) and that ministers in the Ism of Am will, in fact, receive the suggested tax benefits. See pp. 5-6, supra.

organization's disbursements to its ministers, regardless of amount, cannot be successfully challenged by respondent has been repeatedly rejected. See Church of the Transfiguring Spirit v. Commissioner, 76 T.C. 1 (1981); Southern Church of Brotherhood Assembled v. Commissioner, 74 T.C. 1223 (1980).[12] The tax information and advice so permeates petitioner's

---

[12] Section 501(c)(3) specifically requires that "no part" of the organization's net earnings "inure[] to the benefit of any private shareholder or individual." The inurement requirement has been construed to incorporate a "reasonableness" standard. See People of God Community v. Commissioner, 75 T.C. 127 (1980); Saint Germain Foundation v. Commissioner, 26 T.C. 648 (1956). Petitioner's "instructions" focus on maximum tax benefits; no consideration is given to the "reasonableness" limitation.

literature [13] that we cannot help but conclude that although petitioner may well advocate belief in the God of Am, it also advocates belief in the God of Tax Avoidance. We conclude that petitioner's activities constitute a substantial nonexempt purpose.

On brief, petitioner discusses its religious activities at great length and contends that it "is primarily engaged in the furtherance of what some may call its unorthodox religious beliefs, which, despite the opinion of the Respondent,

---

[13] We recognize that some of petitioner's literature is relatively devoid of the tax avoidance message. For example, both "The Book of Am - The Enlightenment" and the pamphlet "The Proof of Am" mention taxes only once, in a sentence which states that, "[m]oreover, beyond the possession of such power over others, the church is materially the richest corporation in the world and for the most part pays no taxes." However, the rest of petitioner's literature contains so many suggestions and recommendations regarding maximizing tax benefits that one cannot but conclude that a substantial nonexempt purpose permeates the literature taken as a whole.

fall within the 'protections of the * * * First Amendment,'" citing The Church in Boston v. Commissioner, 71 T.C. 102 (1978). For purposes of this opinion, we have accepted as true petitioner's description of its activities and its contention that its "unorthodox religious beliefs" are, in fact, held. See note 4, supra. Contrary to petitioner's contentions, however, such a finding does not require us to conclude that petitioner is tax-exempt because, as we have already noted, the existence of a single substantial nonexempt purpose destroys exempt status. See pp. 10-11, supra, and cases cited thereat.

Petitioner presents three arguments why its emphasis on tax advantages and administrative details does not violate the operational test of section 501(c)(3). First, petitioner contends that it would be remiss if it did not share this tax

information with its members. We disagree. There is a big difference between informing members that ministers may be entitled to special tax benefits, as an incident to carrying on primarily religious activities, and suggesting innumerable methods by which ministers can maximize tax benefits, which is carried on as a substantial activity in and of itself. Petitioner's activity in this regard is so pervasive that it goes far beyond any bona fide religious purpose.

Second, petitioner contends that respondent has placed it in a "damned if you do, damned if you don't" position and, therefore, that its discussion of tax benefits does, in fact, promote a religious purpose. Specifically, petitioner contends that if its members were not instructed in the details of administering their orders, respondent could deny tax-exempt status to the

individual orders for failure to comply with regulations concerning proper administration of tax-exempt organizations. This argument misconstrues respondent's position. Petitioner is not "damned" because it explains simple record keeping procedures to its members; petitioner is "damned" because its detailed discussions of ways to maximize tax benefits are so pervasive that they constitute a substantial nonexempt purpose.

Third, petitioner contends that its discussions of tax benefits are necessary to attract new members, which is, petitioner claims, the major objective at this stage of the young organization's life. However, a substantial non-exempt purpose does not become an exempt purpose simply because it promotes the organization in some way. See First Libertarian Church v. Commissioner, supra.

Petitioner also makes the general argument that its discussion of taxes cannot be considered "tax avoidance" unless petitioner is a sham. We disagree. There is nothing inconsistent between saying that a religious organization is, in fact, bona fide and denying that organization tax-exempt status because it carries on a substantial nonexempt activity. See, e.g., Bethel Conservative Mennonite Church v. Commissioner, 80 T.C. 352 (1983).

Finally, petitioner argues that denial of its tax-exempt status request would violate the establishment and free exercise clauses of the First Amendment and its equal protection rights under the due process clause of the Fifth Amendment. It is well settled, however, that --

> the Government may constitutionally tax the income of religious organizations * * * [and] may decide not to exercise this power and grant reasonable exemptions to qualifying organizations while continuing to tax those who fail to meet these

qualifications. Parker v. Commissioner, 365 F.2d 792, 795 (8th Cir. 1966), affg. sub nom. Foundation for Divine Meditation, Inc. v. Commissioner, T.C. Memo. 1965-77. Gen. Conf. of The Free Church v. Commissioner, 71 T.C. 920, 930-931 (1979). Tax exemption is a matter of legislative grace and not of constitutional right. See Unitary Mission Church v. Commissioner, 74 T.C. 507 (1980), affd. without opinion 647 F.2d 163 (2d Cir. 1981). Nevertheless, unconstitutional discrimination might well arise if benefits granted to one religious group are denied to others of essentially the same class. See Golden Rule Church Association v. Commissioner, 41 T.C. 719 (1964).

Petitioner's constitutional arguments are based on the assumption that respondent has singled it out for attack because of its "non-traditional" or "unorthodox" beliefs. We find, however, that respondent denied petitioner's

application for tax-exempt status, not because of petitioner's beliefs, but because of petitioner's substantial nonexempt purpose.[14] Petitioner has not suggested that there exists, and, we submit, cannot find, a single instance in which respondent has granted tax-exempt status to a religious organization that carried on activities similar to petitioner's. Consequently, on the record before us, respondent's denial of petitioner's application for tax-exempt status is far from being constitutionally infirm. See, Christian Echoes National Ministry v. United States, 470 F.2d 849

---

[14] We are aware that respondent also "questions" whether petitioner's beliefs are sincerely held. Given the pervasive nature of petitioner's tax avoidance discussions, it is not surprising that respondent would take such a position. However, we are convinced that, given the nature of petitioner's activities, this disbelief was not the reason petitioner's request was denied.

(10th Cir. 1972); Gen. Conf. of The Free Church v. Commissioner, supra.

In the interest of justice, we feel compelled to reiterate the limited nature of our holding. We are not holding today that any group which discusses the tax consequences of donations to and/or expenditures of its organization is in danger of losing or not acquiring tax-exempt status. Our holding today goes only to those organizations whose entire existence is permeated with the purpose of counseling taxpayers on tax matters.

In sum, petitioner is, as we have previously pointed out (see pp. 10-11, supra), nothing more than a commercial tax service, albeit in a narrow range of matters of interest to its members, operating under the cover of a professed religious purpose (which we have accepted as true for the purposes of this case). That religious belief may be the body of

the automobile but its engine and the gasoline on which it runs consist of tax information and advice as to methods of tax avoidance, if not downright tax evasion. There is simply no escape from the conclusion that petitioner is operated for a substantial non-exempt purpose. Accordingly,

Decision will be entered for respondent.

UNITED STATES TAX COURT

THE ECCLESIASTICAL ORDER OF THE ISM OF AM, INC., Petitioner,	)
v.	Docket No. 10769-81 X
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)

DECISION

Pursuant to the Opinion of this Court, filed May 2, 1983, it is

DECLARED, ADJUDGED, and DECIDED: That petitioner is not operated exclusively for exempt purposes under section 501(c)(3), Internal Revenue Code of 1954, as amended, and is therefore not entitled to exemption under sections 501(a) and 501(c)(3), Internal Revenue Code of 1954, as amended.

Judge

Entered: May 3, 1983

UNITED STATES TAX COURT

THE ECCLESIASTICAL ORDER OF THE ISM OF AM, INC., Petitioner,	)
v.	Docket No. 10769-81 X
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)

O R D E R

Petitioner having, on June 1, 1983, filed a motion for reconsideration of the Opinion of the Court, filed May 2, 1983 (80 T.C. No. 43), together with a brief in support thereof, after due consideration, it is

ORDERED that petitioner's motion is denied. Petitioner's assertion that the Court erred in not permitting evidence to be introduced in addition to the administrative record is without merit. Est of Hawaii v. Commissioner, 71 T.C. 1067, 076 (1979), affd. without opinion

647 F.2d 170 (9th Cir. 1981); Church in Boston v. Commissioner, 71 T.C. 102, 105-106 (1978). See also Tamko Asphalt Products, Inc. of Kansas v. Commissioner, 658 F.2d 735, 738-739 (10th Cir. 1981), affg. 71 T.C. 824 (1979).

Theodore Tannenwald, Jr.
Chief Judge

Dated: Washington, D.C.
June 8, 1983

UNITED STATES TAX COURT

THE ECCLESIASTICAL ORDER OF THE ISM OF AM, INC., Petitioner,	)
v.	Docket No. 10769-81 X
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)

O R D E R

Petitioner having, on June 1, 1983, filed a motion to vacate or revise the decision of the Court in the above entitled case, entered on May 3, 1983, together with a brief in support of said motion, after due consideration, it is

ORDERED that petitioner's motion is denied. Petitioner's assertion that the Court erred in not permitting evidence to be introduced in addition to the administrative record is without merit. Est of Hawaii v. Commissioner, 71 T.C. 1067, 1076 (1979), affd. without opinion 647 F.2d 170 (9th Cir. 1981); Church in

Boston v. Commissioner, 71 T.C. 102, 105-106 (1978). See also Tamko Asphalt Products, Inc. of Kansas v. Commissioner, 658 F.2d 735, 738-739 (10th Cir. 1981), affg. 71 T.C. 824 (1979).

Theodore Tannenwald, Jr.
Chief Judge

Dated: Washington, D.C.
June 8, 1983

84-1053

Office-Supreme Court, U.S.
FILED
JAN 2 1985
ALEXANDER L. STEVAS,
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1984, TERM

THE ECCLESIASTICAL ORDER
OF THE ISM OF AM, INC., PETITIONER

V.

COMMISSIONER OF INTERNAL REVENUE

- APPENDIXES C AND D -

TO THE
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH FALCONE

4000 Town Center
Suite 500
Southfield, MI 48075
(313) 357-0666

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

APPENDIX A

OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS.....A-1

ORDER DENYING PETITION FOR REHEARING ENBANC.....A-5

APPENDIX B

ORDER OF THE UNITED STATES TAX COURT DENYING MOTION TO SUPPLEMENT THE RECORD.....B-1

MEMORANDUM SUR ORDER OF UNITED STATES TAX COURT DENYING MOTION TO SUPPLEMENT THE RECORD.....B-3

OPINION OF THE UNITED STATES TAX COURT.....B-9

DECISION OF UNITED STATES TAX COURT.....B-36

ORDER AND OPINION OF UNITED STATES TAX COURT DENYING MOTION FOR RECONSIDERATION.....B-37

ORDER AND OPINION OF UNITED STATES TAX COURT DENYING MOTION TO VACATE OR REVISE THE DECISION.....B-39

APPENDIX C

ADMINISTRATIVE RULING
OF THE IRS INTIALLY
DENYING REQUEST FOR
TAX EXEMPT STATUS.....C-1

FINAL ADMINISTRATIVE
ADVERSE RULING OF THE
IRS DENYING REQUEST FOR
TAX EXEMPT STATUS.....C-17

APPENDIX D

26 USC 170(b).....D-1

26 USC 501.....D-2

26 USC 508.....D-4

26 USC 509.....D-6

26 USC 7428.....D-7

5 USC 554.....D-9

5 USC 556.....D-14

5 USC 706.....D-15

TAX COURT RULE 210(b)(11).....D-17

TAX COURT RULE 217(b).....D-18

FIRST AMENDMENT TO
THE UNITED STATES
CONSTITUTION.....D-20

FIFTH AMENDMENT TO
THE UNITED STATES
CONSTITUTION.....D-20

Internal Revenue Service
Department of Treasury
Washington, DC 28224

Person to Contact: Mr. Gillette
The Ecclesiastical Order of the
Ism of Am
30205 Longfellow
Madison Heights, Michigan 48017

Telephone Number: 202/566-4702
Refer Reply to: E:EO:T:R:1-2
Date: September 25, 1980

Attn: Rev. George N. Baustert

Dear Applicant:

We have considered your application for recognition of exemption under section 501(c)(3) of the Internal Revenue Code.

The information submitted indicates that you were formed as a non-profit ecclesiastical corporation under the laws of the State of Michigan on August 23, 1978. Your corporation is organized as a church. Your members hold a belief in AM as the true diety of the universe and that

AM, the Almighty Maker, is the "ultimate force that did make (create) the Ultimate Creation." The Doctrine of AM is that all humankind has the responsibility to intelligently determine what is right for them with recognition and respect for the rights of all humankind, to attain the true values of the "Ideal Life."

All ministers of the Ism of Am are ordained by the Home Office. After ordainment, the minister may apply for a Chartered Order which enables him to go out and establish an Ism of Am congregation. Each chartered order is then "granted the PRIVILEGE of using the Federal and State identification numbers and the TAX EXEMPT status of the Home Office." You instruct your ministers that all that is needed to start a congregation is the minister and two other persons over the age of 18.

At present, your organization consists of the Home Office and 26 chartered orders. These chartered orders consist mostly of family groups, although some do have officers that are not related. The religious service of the Ism of Am is communion of the Blood of Am and the Flesh of Am, which you call the "Next Supper." Your orders are instructed to conduct this activity as being the most obvious way of meeting the requirements of section 501(c)(3) of the Internal Revenue Code.

You stress the bookkeeping and business aspects of running an order and your literature emphasizes the tax advantages of being an exempt organization almost exclusively. Your organization "ordains" individuals as ministers for a fee of $25 and presents them with a certificate, instructions regarding the duties and constitutional rights of

religious bodies, a key ring, a personal copy of the Book of Am, and instructions on how to perform a civil wedding. Thereafter, for fees ranging from $50 - $75, a person may obtain an Ecclesiastical Charter, Certification as a Bishop and Canonization to Cardinal. The latter three carry with them further instructions regarding income tax laws and what the individual may do to avoid income tax liability. These items are never awarded free of charge or on a merit basis.

In addition, a cardinal may take instruction to become a Membership Counselor, at which time he can earn a "tax free income" for his order of $100 for each new member brought into the Ecclesiastical Order of the Ism of Am, and may grant order charters. All donations received from the new orders are to be shared with the Home Office. The present

"minimum donation" for new membership kits is $200 which, when received from the new member, is split 50/50 with the Home Office.

You advocate door to door canvassing, prospecting by telephone, conventional advertising and discussion with friends, neighbors and business associates at a "Membership Recruiting Social," at which time you acquaint these people with the benefits of being a minister of Am, as methods of finding new members. New members are required to sign an "I Am U thru U Am I" vow, renouncing any and all false gods, in order to prove, ostensibly to the Internal Revenue Service, that their beliefs are sincerely held. Further, Membership Counselors are told that they "must get" new members to go "all the way" and become bishops and cardinals themselves. Chartered Orders are instructed that they are not

authorized to answer any questions about the order to the Internal Revenue Service and that all inquiries are to be referred to the Home Office. You state that the Ism of Am is not a tax reform movement and you also state that: "We would be remiss in our duties if we did not provide for our ministers and members to participate in the FREE RIDE being given to the Pope, Billy Graham, Ms. Carter, ad infinitum." You admonish your members to: "Run your business with businesslike finesse, and you'll never be the business of the IRS."

Section 501(c)(3) of the Internal Revenue Code provides for the exemption of organizations organized and operated exclusively for religious, charitable, and certain other purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Section 1.501(c)(3)-1 of the Income

Tax Regulations states that an organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

Based on the information provided, it appears that you are not operated exclusively for one or more exempt purposes as specified in section 501(c)(3) of the Code. Your activities are neither religious nor educational as they are exclusively oriented toward instructing and encouraging individuals to illegitimately avoid income taxes by setting up superficial organizations in the guise of churches. Your primary activity is the sale of a service, a

method of obtaining exemption from Federal income taxes, in return for a fee, to members of the general public. Your sale of church charters as the attachments to your application indicate, are meant to be the sale of tax exemptions, for you advise potential charterees that they will be authorized to use your tax exempt status. In addition, your Articles of Association do not limit your purposes to those set forth in section 501(c)(3) of the Code nor do they include a provision providing for the distribution of your assets upon dissolution exclusively to organizations exempt under section 501(c)(3) of the Code. The copies of the Certificate of Amendment forwarded to this office do not evidence approval by the proper state authorities. For these reasons, we have concluded that you are not entitled to recognition of exemption under section

501(c)(3) of the Code.

We have also considered whether your organization qualifies as a "church" as the term is used in section 170(b)(1)(A)(i) of the Code.

Section 170(b)(1)(A)(i) of the Code provides for the deductibility of contributions to a "church or a convention or association of churches." Neither the Internal Revenue Code nor the underlying Income Tax Regulations defines the phrase "church or a convention or association of churches." Instead, the courts have defined the phrase. For instance, in the case of Chapman v. Commissioner, 48 T.C. 358 (1967), the Court pointed out that not every religious organization is a church and that congress did not intend that the term "church" be used in its generic or universal sense. The Court said the test as envisioned by Congress is whether an organization is engaged in carrying out

church functions. Therefore, what is a "church" for the purposes of the Code must be interpreted in light of the common understanding of the word.

From the information submitted, it appears that you have no distinct form of worship. Your orders engage in a Next Supper activity on occassion merely to comply with Internal Revenue Service requirements. You grant ordination, bishop, and cardinal certificates without the completion of any formal studies but merely for the receipt of a fee. You have not indicated any criteria for the qualification of practitioners of your religion, you do not have a Sunday school for the religious instruction of the young, nor do you require your members to renounce any former religious affiliations, but merely to renounce "false gods."

Based on your answers to our questions regarding church characteristics, we conclude that you are not a church as the term is intended by Congress in the context of the Internal Revenue Code because you do not possess sufficient characteristics of a church and do not perform the functions of a church.

Because you are not a church for the purposes of the Internal Revenue Code, its provisions concerning parsonages do not apply to you.

Section 508(a)(2) of the Code provides that an organization organized after October 9, 1969, shall not be treated as an organization described in section 501(c)(3) for any period before giving notice that it is applying for recognition of exempt status, if such notice is given after the time prescribed by regulation.

Section 1.508-1(a)(2)(i) of the

Income Tax Regulations provides that an organization seeking exemption under section 501(c)(3) of the Code must file the notice described in section 508(a) within 15 months from the end of the month in which the organization was organized, or before March 22, 1973, whichever comes later. Such notice is filed by submitting a properly completed and executed Form 1023, Application for Recognition of Exemption with the key District Director.

The records indicate that you filed for recognition of exemption from federal income tax under section 501(c)(3) on December 30, 1979, which is more than 15 months from the end of the month in which you were incorporated. As we have determined that you are not a church, even if you were to be recognized as exempt under section 501(c)(3), the provisions of section 508(a)(2) of the Code would apply

to you and exemption would only be recognized prospectively.

You are required to file federal income tax returns.

Contributions to you are not deductible under section 170 of the Code.

Further, it should be noted that an Employer Identification Number is not a "tax exempt number" and is personal to the organization to which it is issued. In any event, a ruling covers only the specific organization applying for recognition of exemption and does not cover any of the subordinate organizations unless the group rulings procedures are followed. Your practice of informing your chartered orders that they may use your Employer Identification Number as a "tax exempt number" is erroneous and misrepresents the Service's practice in this matter. Each subordinate organization should apply for its own

Employer Identification Number and file its own tax returns.

You have a right to protest this ruling if you believe that it is incorrect. To protest, you should submit a statement of your views with a full explanation of your reasoning. This statement, signed by one of your principal officers, must be submitted in duplicate within 21 days from the date of this letter. You also have a right to a conference in this office after your statement is submitted. You must request the conference, if you want one, when you file your protest statement. If you are to be represented by someone who is not one of your principal officers, that person will need to file a proper power of attorney and otherwise qualify under our Conference and Practice Requirements.

If you do not protest this proposed

ruling in a timely manner, it will be considered by the Internal Revenue Service as a failure to exhaust available administrative remedies. Section 7428(b)(2) of the Internal Revenue Code provides, in part, that, "A declaratory judgment or decree under this section shall not be issued in any proceeding unless the Tax Court, the Court of Claims, or the district court of the United States for the District of Columbia determines that the organization involved has exhausted administrative remedies available to it within the Internal Revenue Service."

If we do not hear from you within 21 days, this action will become final, and copies hereof will be forwarded to the District Director, Detroit, Michigan. Thereafter, any questions about your federal income tax status or the filing of tax returns should be addressed to that

office.

Also, the appropriate state officials will be notified of this action in accordance with section 6104(c) of the Code.

Sincerely yours,

J.E. Griffith
Chief, Rulings Section 1
Exempt Organizations
Technical Branch

cc: DD, Detroit
Attn: EO Group
cc: State Officials
cc: E.F. Records

Internal Revenue Service
Department of the Treasury
Washington, D.C. 20224

Date: February 18, 1981

Employer Identification Number:
38-2257252
Form Number:

Tax Years:
1978 to present

The Ecclesiastical Order of the
Ism of Am
30205 Longfellow
Madison Heights, Michigan 48071

Person to contact:
Joseph Chasin
Contact Telephone Number:
202/566-3201

Dear Applicant:

This is a final adverse ruling as to your exempt status under section 501(c)(3) of the Internal Revenue Code.

Our adverse ru_ng was made for the following reasons(s): You are not operated exclusively for religious or any exempt purpose described in section 501(c)(3) of the Code. You are not operated in such a manner that no part of

your net earnings will inure to the benefit of any individual. In addition, you are operated for private rather than public interests. We have also determined that if you were described in section 501(c)(3), you would be a private foundation because you are not a church within the meaning of section 170(b)(1)(A)(i), the only basis upon which you claim non-private foundation status. As we have determined that you are not a church, even if you were to be recognized as exempt under section 501(c)(3), the provisions of section 508(a)(2) would apply to you and exemption would only be recognized prospectively.

Contributions to your organization are not deductible under Code section 170.

You are required to file Federal income tax returns on the above form. Based on the financial information you

furnished, it appears that returns should be filed for the years shown above. These returns should be filed with your key District Director for exempt organization matters within 30 days from the date of this letter unless a request for an extension of time is granted. Processing of income tax returns and assessment of any taxes due will not be delayed because a petition for declaratory judgment has been filed under Code section 7428. Returns for subsequent tax years should be filed with the appropriate service center indicated in the instructions for those returns.

If you decide to contest this ruling under the declaratory judgment provisions of section 7428 of the Code, a petition to the United States Tax Court, the United States Court of Claims, or the United States District Court for the District of Columbia must be filed within 90 days from

the date this ruling was mailed to you. Contact the clerk of the appropriate court for rules for filing petitions for declaratory judgment.

In accordance with section 6104(c) of the Code, the appropriate State officials will be notified of this action.

If you have any questions, please contact the person whose name and telephone number are shown in the heading of this letter.

Thank you for your cooperation.

Sincerely yours,

E. D. Coleman
Chief, Exempt Organizations
Technical Branch

§170(b)

(b) PERCENTAGE LIMITATIONS--

(1) INDIVIDUALS-- In the case of an individual, the deduction provided in subsection (a) shall be limited as provided in the succeeding subparagraphs.

(A) GENERAL RULE-- Any charitable contribution to--

(i) a church or a convention or association of churches,

26 USCS

§501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUST, ETC.

(a) EXEMPTION FROM TAXATION--An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503 ... (c) LIST OF EXEMPT ORGANIZATIONS--The following organizations are referred to in subsection (a): (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of

the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

§508. SPECIAL RULES WITH RESPECT TO SECTION 501(c)(3) ORGANIZATIONS.

(a) NEW ORGANIZATIONS MUST NOTIFY SECRETARY THAT THEY ARE APPLYING FOR RECOGNITION OF SECTION 501(c)(3) STATUS.--Except as provided in subsection (c), an organization organized after October 9, 1969, shall not be treated as an organization described in section 501(c)(3)--

(1) unless it has given notice to the Secretary, in such manner as the Secretary may by regulations prescribe, that it is applying for recognition of such status, or

(2) for any period before the giving of such notice, if such notice is given after the time prescribed by the Secretary by regulations for giving notice under this subsection.

(b) PRESUMPTION THAT ORGANIZATIONS

ARE PRIVATE FOUNDATIONS--Except as provided in subsection (c), any organization (including an organization in existence on October 9, 1969) which is described in section 501(c)(3) and which does not notify the Secretary, at such time and in such manner as the Secretary may by regulations prescribe, that it is not a private foundation shall be presumed to be a private foundation.

(c) EXCEPTIONS--

(1) MANDATORY EXCEPTIONS--Subsections (a) and (b) shall not apply to--

(A) churches, their integrated auxiliaries, and conventions or associations of churches, or

(B) any organization which is not a private foundation (as defined in section 509(a)) and the gross receipts of which in each taxable year are normally not more than $5,000.

§509. PRIVATE FOUNDATION DEFINED.

(a) GENERAL RULE--For purposes of this title, the term "private foundation" means a domestic or foreign organization described in section 501(c)(3) other than--

(1) an organization described in section 170(b)(1)(A) (other than in clauses (vii) and (viii);

§7428. DECLARATORY JUDGMENTS RELATING TO STATUS AND CLASSIFICATION OF ORGANIZATIONS UNDER SECTION 501(c)(3), ETC.

(a) CREATION OF REMEDY--In a case of actual controversy involving--

(1) a determination by the Secretary--

(A) with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3) which is exempt from tax under section 501(a) or as an organization described in section 170(c)(2), ... (2) upon the filing of an appropriate pleading, the United States Tax Court, the United States Claims Court, or the district court of the United States for the District of Columbia may make a declaration with respect to such initial qualification or continuing qualification

or with respect to such initial classification or continuing classification. Any such declaration shall have the force and effect of a decision of the Tax Court or a final judgment or decree of the district court or the Claims Court, as the case may be, and shall be reviewable as such. For purposes of this section, a determination with respect to a continuing qualification or continuing classification includes any revocation of or other change in a qualification or classificiation.

§554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved--

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a [an] administrative law judge appointed under section 3105 of this title [5 USCS§ 3105];

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of--

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested

parties opportunity for--

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title [5 USCS §§ 556 AND 557].

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title [5 USCS § 556] shall make the recommended decision or initial decision required by section 557 of this title [5 USCS § 557], unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not--

(1) consult a person or party on a

fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title [5 USCS § 557], except as witness or counsel in public proceedings. This subsection does not apply--

(A) in determining applications for initial licenses;

(B) to proceedings involving the

validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

(Sept. 6, 1966, P.L. 89-554, §1, 80 Stat. 384; Mar. 27, 1978, P.L. 95-251, §2(a)(1), 92 Stat. 183.)

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section. ... (e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Sept. 6, 1966, P.L. 89-554, §1, 80 Stat. 393.)

United States Tax Court Rule 210

Rule 210. General

(b) Definitions:

(11) "Administrative record" includes the request for determination, all documents submitted to the Internal Revenue Service by the applicant in respect of the request for determination, all protests and related papers submitted to the Internal Revenue Service, all written correspondence between the Internal Revenue Service and the applicant in respect of the request for determination or such protests, all pertinent returns filed with the Internal Revenue Service, and the notice of determination by the Commissioner. In addition--

United States Tax Court Rule 217

Rule 217. Disposition of Actions for Declaratory Judgment

(b) Procedure:

(1) Disposition on the Administrative Record: The Court expects that, within 30 days after service of the answer, the parties will file with the Court the entire administrative record (or so much thereof as either party may deem necessary for a complete disposition of the action for declaratory judgment), stipulated as to its genuineness. If, however, the parties are unable to file such a stipulated administrative record, then, not sooner than 30 days nor later than 45 days after service of the answer, the Commissioner shall file with the Court the entire administrative record, as defined in Rule 210(b)(11), appropriately certified as to its genuineness by the Commissioner or by an official authorized

to act for him in such situation. See Rule 212, as to the time and place for submission of the action to the Court. The Court will thereafter issue an opinion and declaratory judgment in the action. Except in a case involving a revocation or the status of a governmental obligation, the Court's decision will be based upon the assumption that the facts as represented in the administrative record as so stipulated or so certified are true and upon any additional facts as found by the Court if the Court deems that a trial is necessary. In the case of a revocation or a governmental obligation action, the Court may, upon the basis of the evidence presented, make findings of fact which differ from the administrative record. In the case of a governmental obligation action, see the last sentence of paragraph (a) of this Rule. See subparagraph (3) of this paragraph.

AMENDMENT I.

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V.

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Supreme Court, U.S.
FILED
MAR 19 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1053

In the Supreme Court of the United States

OCTOBER TERM, 1984

THE ECCLESIASTICAL ORDER OF THE ISM OF AM, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

B.S.W. Group, Inc. v. *Commissioner*, 70 T.C. 352 6-7

Better Business Bureau v. *United States*, 326 U.S. 279 4

Christian Echoes National Ministry, Inc. v. *United States*, 470 F.2d 849, cert. denied, 414 U.S. 864 5

Christian Manner International, Inc. v. *Commissioner*, 71 T.C. 661 7

Church in Boston v. *Commissioner*, 71 T.C. 102 6

Church of Scientology v. *Commissioner*, 83 T.C. 381 6

EST of Hawaii v. *Commissioner*, 71 T.C. 1067, aff'd mem., 647 F.2d 170 (Table) 7

Houston Lawyer Referral Service, Inc. v. *Commissioner*, 69 T.C. 570 7

Regan v. *Taxation With Representation*, 461 U.S. 540 5

Universal Life Church, Inc. v. *Commissioner*, 691 F.2d 504 6

Universal Life Church, Inc. v. *IRS*, 372 F. Supp. 770 6

Page

Cases—Continued:

Universal Life Church, Inc. v. *United States*, 50 A.F.T.R.2d (PH) ¶ 82-5108 6

Universal Oil Products Co. v. *Campbell*, 181 F.2d 451, cert. denied, 340 U.S. 850 4

Statutes and rule:

Internal Revenue Code of 1954 (26 U.S.C.):

Section 501(c)(3) 3, 4

Section 7428(a) 6

Section 7428(a)(1)(A) 3

Tax Ct. R. 210(b)(1) 6

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1053

THE ECCLESIASTICAL ORDER OF THE ISM OF AM, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner challenges the court of appeals' affirmance of a Tax Court decision upholding the Commissioner's denial to it of tax-exempt status. The decision below is correct, does not conflict with that of any other circuit, and does not warrant review by this Court.

1. Petitioner was incorporated in Michigan in 1978 (Pet. App. B11). Petitioner originally sought converts through a pamphlet entitled "The Proof of Am," which explains the group's deistic beliefs (*id.* at B12). Subsequently, petitioner developed a new recruiting approach, which emphasizes to a great extent the alleged tax benefits of becoming an Ism of Am minister (*id.* at B13).

Petitioner awards degrees and titles to its converts upon their completion of various "Phases of Awareness" (Pet. App. B13-B14). For a donation of $25 ("Phase I"), one is

ordained a minister in the Ism of Am (*id.* at B14). Each new minister receives a copy of "The Book of Am," an Ism of Am key ring, a ministry certificate "ready for framing," and instructions for performing civil wedding ceremonies (*id.* at B14). For a donation of $75 ("Phase II"), the initiate receives a "Doctorate of Divinity degree," a "Legal Charter * * * complete with federal and state exempt numbers," and a pamphlet entitled "Untaxables I" (*id.* at B14-B15). For an additional donation of $50 ("Phase III"), one receives a "Certificate of Bishop" and a pamphlet entitled "Untaxables II." And for an added donation of $50 ("Phase IV"), one becomes a "Cardinal" and receives pamphlets entitled "Untaxables III" and "Share with Am." *Ibid.*

The instructional pamphlets accompanying each "Phase of Awareness" discuss, in great detail, the alleged tax benefits of being a minister in the Ism of Am. "Untaxables I," for example, provides a laundry list of personal expenses assertedly qualifying for the minister's housing allowance (Pet. App. B16). "Untaxables II" suggests deducting the costs of maintaining an automobile, on the theory that "you as the Minister are always seeking new members to 'Share With Am' everywhere you go" (*id.* at B17). "Untaxables III" advises that "there is a way * * * to significantly reduce the amount of withholding taxes taken from [your] paychecks" and that "[m]inistry in the Ism of Am is the answer" (*id.* at B18). "Orders of Law I" asserts that "[t]he wealthy families in this country have taken advantage of the tax laws * * * for more than two centuries" and that "[i]t is for this reason that we do not have to explain or defend our actions regarding the avoidance of taxes" (*id.* at B18-B19). A pamphlet entitled "Orders of Administration I" intones, "[r]un your business with businesslike finesse, and you'll never be the business of the IRS" (*ibid.*). And a "licensing examination" administered to Ism of Am recruiters (called "membership counselors") consists of 50 short-answer questions,

virtually all of which deal with some aspect of the federal tax laws (*id.* at B21).

Petitioner applied to the IRS for recognition of exemption from federal income tax as a "religious organization" under Section 501(c)(3) of the Code.[1] The Commissioner denied the application. He determined that petitioner was not operated exclusively for religious purposes, or for any other tax-exempt purpose, and that at least part of petitioner's earnings would inure to the benefit of private individuals (Pet. App. C17-C18).

After exhausting administrative remedies, petitioner sought review of the Commissioner's decision by filing this declaratory judgment action in the Tax Court.[2] That court sustained the Commissioner's determination (Pet. App. B9-B38). It accepted, for purposes of its decision, the sincerity of petitioner's religious beliefs and petitioner's description of its religious activities (*id.* at B12 n.4). The court determined, however, that, in addition to whatever religious purposes petitioner might have, it also had a substantial nonexempt purpose, which consisted of "counseling individuals, for specific 'donations,' on the purported tax benefits" that might be achieved by joining its organization (*id.* at B24). In this respect, the Tax Court found that the information petitioner disseminated was similar to (although not necessarily as accurate as) advice furnished by any commercial tax service, albeit within a narrower field and a

---

[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

[2]Section 7428(a)(1)(A) of the Code permits an organization to seek a declaratory judgment concerning a determination by the Commissioner as to its "initial qualification or continuing qualification * * * as an organization described in section 501(c)(3)."

narrower class of customers (*id.* at B25).[3] The court denied petitioner's motion to supplement the administrative record with various oral declarations (*id.* at B1-B7). And it rejected petitioner's First Amendment arguments, holding that the government may legitimately decline to grant tax exemptions to organizations that fail to meet the qualifications set forth in Section 501(c)(3) (Pet. App. B22-B24, B27-B28, B31-B34). The court of appeals affirmed in a per curiam decision, "[b]ased upon the thoughtful and thorough opinion" of the Tax Court (*id.* at A1-A3).

2. Section 501(c)(3) provides that an organization "organized and operated exclusively for religious, charitable [or other specified] purposes" shall be exempt from federal income tax, provided that no part of its earnings inures to the benefit of any private shareholder or individual and that it engages in no prohibited political activity. A nonexempt purpose that is merely incidental does not disqualify an organization from tax exemption. However, a nonexempt purpose or activity that is "substantial" does disqualify it, regardless of how many exempt purposes the organization may have, or how important those exempt purposes may be. *Better Business Bureau* v. *United States,* 326 U.S. 279, 283 (1945); *Universal Oil Products Co.* v. *Campbell,* 181 F.2d 451, 464 (7th Cir.), cert. denied, 340 U.S. 850 (1950).

The Tax Court correctly upheld the Commissioner's denial of tax exempt status to petitioner because the administrative record disclosed that petitioner was operated

---

[3]The Tax Court noted "the limited nature of [its] holding" in this respect, emphasizing that its reasoning applied "only to those organizations whose entire existence is permeated with the purpose of counseling taxpayers on tax matters," and that a charitable organization which discusses incidentally the tax consequences of donations by its contributors runs no risk of losing (or of failing to acquire) tax-exempt status (Pet. App. B34).

largely to dispense "tax information and advice as to methods of tax avoidance, if not downright tax evasion" (Pet. App. B35). This was obviously a substantial nonexempt purpose. The court of appeals concurred in that finding (*id.* at A3), and there is no reason for this Court to review that factual determination.

3. Petitioner does not appear seriously to question the findings of the courts below, but rather seems to challenge the government's right to deny it a tax exemption under any circumstances whatsoever. Petitioner contends (Pet. 5-10, 18-29, 50-57), for example, that the decision below unconstitutionally infringes its freedom of speech and free exercise of religion, on the theory that the IRS has singled it out for attack because of its "non-traditional" or "unorthodox" beliefs.

This contention is frivolous. It is settled that "tax exemption is a privilege, a matter of grace rather than right," and that denial of such a privilege does not deprive a taxpayer of First Amendment freedoms. *Christian Echoes National Ministry, Inc.* v. *United States,* 470 F.2d 849, 857 (10th Cir. 1972), cert. denied, 414 U.S. 864 (1973). See *Regan* v. *Taxation With Representation,* 461 U.S. 540 (1983). Nor can petitioner make out any colorable argument that the IRS or the courts below discriminated against it because of the content of its beliefs. The Tax Court accepted for purposes of its decision the sincerity of petitioner's religious beliefs, and it correctly pointed out that the IRS "denied petitioner's application for tax-exempt status, not because of petitioner's beliefs, but because of petitioner's substantial nonexempt purpose" (Pet. App. B32-B33). It could not seriously be contended (and petitioner does not contend)

that the dissemination of tax advice constitutes religious activity.[4]

4. Finally, petitioner objects to the Tax Court's refusal (Pet. App. B5-B6) to allow it to supplement the administrative record with certain additional documents. See Pet. 13, 16, 40-49. Rule 210(b)(1) of the Tax Court Rules defines the "administrative record" to include all documents submitted to the IRS and all written correspondence between the parties. The additional documents petitioner wished to submit to the Tax Court consisted of an internal IRS worksheet and a declaration signed by petitioner's founder purporting to summarize statements he made orally at a meeting with IRS officials (R. Doc. 12, Exhs. A, B and C). As the Tax Court correctly observed (Pet. App. B6-B7), such items do not qualify for inclusion in the administrative record as defined in Rule 210(b)(1). The principle that declaratory judgment actions under Section 7428(a) are to be decided on the basis of the administrative record carries out the intent of Congress and has been repeatedly affirmed. *Church in Boston* v. *Commissioner,* 71 T.C. 102, 105-106 (1978); *B.S.W. Group, Inc.* v. *Commissioner,* 70 T.C. 352,

---

[4]Petitioner also asserts (Pet. 30-39) that the IRS has preferred similarly-situated religions over it. But it is clear that the Commissioner has a "vigorous enforcement policy against churches which overreach the conditions of their exemption" (*Church of Scientology* v. *Commissioner,* 83 T.C. 381, 453 (1984)), and the IRS pursues this policy even-handedly. Petitioner seems to ground its allegation of discrimination on the supposed fact that it is "similar to and * * * patterned after the Universal Life Church" (Pet. 11), which, in petitioner's words, "blatantly sells tax advice" (*id.* at 32). But the government has repeatedly resisted claims to tax exemption made by local units of the Universal Life Church. See *Universal Life Church, Inc.* v. *IRS,* 372 F. Supp. 770 (E.D. Cal. 1974); *Universal Life Church, Inc.* v. *United States,* 50 A.F.T.R.2d (P-H) ¶ 82-5108 (E.D. Cal. 1982); *Universal Life Church, Inc.* v. *Commissioner,* 691 F.2d 504 (8th Cir. 1982) (Table) (dismissing interlocutory appeal from the Tax Court).

358 n.3 (1978); *Christian Manner International, Inc.* v. *Commissioner,* 71 T.C. 661 (1979); *EST of Hawaii* v. *Commissioner,* 71 T.C. 1067 (1979), aff'd mem., 647 F.2d 170 (9th Cir. 1981) (Table); *Houston Lawyer Referral Service, Inc.* v. *Commissioner,* 69 T.C. 570, 575 (1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1985

DOJ-1985-03